

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

VARTA MICROBATTERY, GMBH, (CAUSE NO. 2:21-CV-400-JRG
)
Plaintiff, ()
vs. ()
EVE ENERGY, CO., LTD., ()
et al., () MARSHALL, TEXAS
() AUGUST 7, 2023
Defendants. () 9:00 A.M.

PRETRIAL CONFERENCE

BEFORE THE HONORABLE ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE

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1 THE COURT: Good morning. Please be seated.

2 For the record, we're here for the pretrial conference
3 in VARTA Microbattery versus EVE Energy, which is under lead
4 Case No. 2:21-400 on our docket.

5 Would counsel state their appearances for the record?

6 MR. STINSON: Good morning, Your Honor. Andy
7 Stinson here for VARTA. Here with me are Mike Hartmann.

8 MR. HARTMANN: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. STINSON: Wes Mueller.

11 MR. MUELLER: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MR. STINSON: Bob Wittmann.

14 MR. WITTMAN: Good morning, Your Honor.

15 THE COURT: Good morning.

16 MR. STINSON: And Paul Filbin.

17 MR. FILBIN: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. STINSON: And Your Honor, We're ready to
20 proceed. Thank you.

21 THE COURT: Thank you, Mr. Stinson.

22 MR. CULBERTSON: Good morning, Your Honor. Geoff
23 Culbertson for EVE Energy. Today from Mayer Brown I have Gary
24 Hnath with me.

25 MR. HNATH: Good morning, Your Honor.

1 THE COURT: Good morning.

2 MR. CULBERTSON: And from the Arch & Lake law firm,
3 I have Shen Wang.

4 MR. WANG: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. CULBERTSON: And Peter Curtin.

7 MR. CURTIN: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. CULBERTSON: And EVE is ready to proceed.

10 THE COURT: Thank you, Mr. Culbertson.

11 MR. CULBERTSON: Thank you.

12 THE COURT: As counsel are aware, this case is set
13 for jury selection before Judge Gilstrap on September the
14 11th. I know that Judge Gilstrap has recently been moving a
15 lot of the jury selections to the Friday before to allow more
16 time during the trial week. I am not aware of that having
17 been done on this case, but I'll seek to find out whether that
18 is going to be done and let you know right away if it is.

19 There are currently three other cases also, three other
20 patent cases on this September 11 docket. I know that some of
21 them are in active settlement negotiation. I'll learn more
22 about that. And there has not been a decision made by Judge
23 Gilstrap's chambers yet about the order of trials for this
24 docket, but I expect that to be coming soon, and I'll make
25 sure you're advised where you stand on it as soon as I know.

1 I wanted to ask a question of counsel for Defendants. I
2 saw a reference in one of the recent notices to a decision to
3 withdraw the invalidity defense. And tell me what the timing
4 on that is.

5 MR. HNATH: Yes, Your Honor.

6 I believe that we have decided to withdraw the defense.
7 We've notified VARTA of that. We can file whatever is
8 necessary formally with the Court, but I think we've also
9 indicated that in our papers as well. So...

10 THE COURT: All right. So I can consider that that
11 is done at this time?

12 MR. HNATH: Yes, Your Honor, you can.

13 THE COURT: All right. Thank you, then, Mr. Hnath.

14 We'll -- I know that will have some effect on some of the
15 other motions, and we can talk about that as we go through.

16 It seems to me, based on looking at the issues and the
17 witnesses, that 11 hours per side should be sufficient for the
18 evidence. That, of course, does not include the time for jury
19 selection, openings, and closings; that's just the time during
20 which each side is presenting evidence to the jury. If either
21 side wants to argue that that is not sufficient, I'm happy to
22 hear the argument, but I see none at this point.

23 MR. HARTMANN: I think Plaintiff is fine with the 11
24 hours, Your Honor.

25 THE COURT: All right. Thank you, Mr. Hartmann.

1 Then there will also be 30 minutes per side for the voir
2 dire, 30 minutes for openings, and you can expect 40 minutes
3 for closings. Obviously you'll have a chance to talk to Judge
4 Gilstrap about that well before closing, but that's his
5 ordinary practice.

6 Does either side have any questions about what the voir
7 dire practice is? I'm happy to answer them, but I know that
8 both sides have local counsel with experience in that regard
9 and you may not need it. But if there are any questions about
10 what Judge Gilstrap's current practices are, I'm happy to take
11 that up.

12 MR. MUELLER: Your Honor, this is Wes Mueller on
13 behalf of VARTA.

14 One of the questions that we had asked and didn't know
15 the precise answer was in the voir dire reference to foreign
16 nationals. It's a German Plaintiff and a Chinese Defendant,
17 and we understand that the Court is very sensitive about
18 reference in that regard, but it seems to us it's a legitimate
19 question that --

20 THE COURT: You're talking about the standing order
21 on motions in limine?

22 MR. MUELLER: Yes.

23 THE COURT: All right. And I do think that you're
24 exactly right, that the -- what Judge Gilstrap is concerned
25 about is attempts at disparagement based on the nationality,

1 and certainly he is not intending to exclude factual
2 references that are relevant to the case. I'm trying to see
3 if I can find the precise language of that standing MIL.

4 MR. CULBERTSON: I believe it's No. 2, Your Honor.

5 THE COURT: Which number, Mr. Culbertson?

6 MR. CULBERTSON: No. 2, I believe.

7 THE COURT: Okay. Right. Certainly, Mr. Mueller,
8 you can be assured that a relevant reference to the
9 nationality of a party will not violate that MIL, but I do
10 think that if there was repeated use of that Chinese company
11 does this and that Chinese company does that, that that might
12 be deemed to cross the line there, but a reference that each
13 party is wherever it is is not going to be a problem.

14 MR. MUELLER: Understood, Your Honor. Thank you.

15 MR. HNATH: And Your Honor, could I just ask one
16 point of clarification?

17 THE COURT: Yes, Mr. Hnath.

18 MR. HNATH: My understanding is that part of the
19 purpose of the voir dire process is to determine whether any
20 members of the potential jury may have biases or prejudices
21 against, for example, Chinese companies, and that is something
22 that we would intend to develop during the voir dire process.

23 THE COURT: And I think that's certainly proper and
24 appropriate, and especially if it's coming from the party that
25 would be the subject of that animus, if there was any. And --

1 in other words, if we had a case against a Chinese defendant
2 and the plaintiff kept asking if the jury had problems with
3 the Chinese doing this or the Chinese doing that, that might
4 be found to be disingenuous, but certainly if your side is
5 concerned about a certain animus, there is nothing
6 inappropriate about reviewing that.

7 And I'll note in the order on MILs that this issue was
8 raised by the parties and that the Court instructed that under
9 the circumstances of this case, appropriate references by both
10 sides to the nationality of their client would not be a
11 violation of this MIL.

12 MR. HNATH: Understood, and thank you, Your Honor.

13 THE COURT: All right. So the -- basically the
14 bottom line is that after the Court has done its standard voir
15 dire and the parties have each used their 30 minutes, or as
16 much of it as they want, then the Court will take up
17 challenges for cause. And then Judge Gilstrap does the
18 peremptory strikes, and I think four per side, on a
19 simultaneous written basis so that each side provides the
20 Court with the four strikes at the same time that -- you will
21 not know the other side's peremptories at the time you do
22 yours and the like, but -- and then the eight jurors first
23 remaining will be the trial jury.

24 Obviously, as you know, there are no alternates in
25 federal civil trials, so all eight will deliberate, but the

1 reason there are eight is that the Court has to have six in
2 order to go to a verdict without consent of both sides and,
3 therefore, eight is chosen so that if unexpectedly one becomes
4 unavailable, or even two, that a case can still proceed to
5 verdict with the remainder.

6 I believe that the deadline for jury questionnaires is
7 August the 14th in this DCO, so if the parties can agree on
8 and believe that a questionnaire would be helpful, we need to
9 have you provide that to our Deputy-In-Charge, Ms. Clendening,
10 by no later than August the 14th. It would probably be
11 prudent, if you can get it done before then, to do it in case
12 there's some problem with what you submit, there will still be
13 time to fix it and get it out. If you do, then that jury
14 questionnaire will be made available to you I believe the
15 Thursday before the jury selection, which I think is September
16 the 7th. But Ms. Clendening can give you details about that
17 if you have any questions.

18 Judge Gilstrap has a standing order on the use of that
19 jury information, so you can consult it if you have detailed
20 questions, but basically the bottom line is that we provide
21 that to counsel with the understanding that counsel will not
22 disseminate it, will not use it beyond the jury selection
23 process; that after that time it will be either returned or
24 destroyed. And we do that as part of our promise to our
25 jurors to keep their information confidential.

1 On that same day, the Thursday before when you can pick
2 up the jury information, we want you to drop off jury
3 notebooks. We do require that there be a set of 12 jury
4 notebooks delivered to the Court by that noon on Thursday.
5 That gives the Court enough time to make sure that they're in
6 proper shape before jury selection.

7 The jury notebook is to have in it the patents, the
8 asserted patents, and if there -- obviously if there are some
9 that are dropped between now and then, then obviously it's
10 only the patents that you'll be -- the Plaintiff will be
11 asserting at trial. But copies of those patents. And we're
12 talking single-sided copies in a three-ring jury notebook with
13 tabs separating the patents and identifying them.

14 The claim construction should also be in there, and as I
15 think counsel understand, the intent of that is not the claim
16 construction order but just a table showing simply the term
17 construed and the Court's construction of it on a side-by-side
18 basis.

19 I noticed in the pretrial order you have some fairly
20 extensive stipulations. Any of those stipulations that are
21 intended for the jury should be in the jury notebook so that
22 the jurors can look at them that way as opposed to the Court
23 reading them the stipulations. To the extent that your
24 stipulations are for purposes of appeal or post-trial, those
25 don't need to be in there, but any stipulation that the

1 parties want the jury to consider should be in the jury
2 notebooks.

3 And then the last section of the jury notebooks is to be
4 a set of pages that have a head-and-shoulders shot of the
5 witness, and under the picture the name of the witness. The
6 intent of those is to allow the jury to see the witness during
7 their deliberations when they're trying to evaluate the
8 testimony. Many of them will be taking notes about the
9 witnesses that will be on the same page as that picture, and
10 the jurors always tell us that that's a real aid to their
11 recollection of the particular testimony of those witnesses.
12 So that's something that we routinely order.

13 I think that we'll be able to get you some written
14 details about the jury notebook and -- but if you have any
15 questions about what that requires, I'll be happy to take them
16 up now.

17 Mr. Stinson or Mr. Culbertson, is there anything that
18 you-all have encountered that you want clarification on?

19 MR. STINSON: No, Your Honor, for Plaintiff. Thank
20 you.

21 MR. CULBERTSON: Thank you, Your Honor. It's clear.
22 Thank you.

23 THE COURT: All right. Great. Thank you.

24 I understand from the pretrial order that there was
25 an issue about when the Defendant was going to be able to

1 identify which of its witnesses would be brought to trial.
2 Is that something that the Defendant is prepared to discuss
3 or has already provided notice of to the Plaintiff?

4 MR. HNATH: Your Honor, we are still working
5 through travel issues for our witnesses. We are keeping
6 VARTA up-to-date in terms of the status of that, and we will
7 continue to do so. We hope within a week to be able to make a
8 final decision on who can actually come to trial, who will be
9 able to come to trial.

10 THE COURT: All right. Thank you, Mr. Hnath.

11 Is that working to the satisfaction of Plaintiff's
12 counsel at this point.

13 MR. HARTMANN: Your Honor, it is partially, but
14 we do want to reserve the right to possibly take some trial
15 depositions should the witness -- or should any of them not
16 show up at the last moment.

17 THE COURT: Have you indicated -- are you just
18 saying you want to have the deposition of their corporate
19 representative, or are there particular employees that you
20 are talking about?

21 MR. HARTMANN: Both, conceivably; both. It would
22 obviously be limited to those witnesses who will then -- who
23 will not show up.

24 THE COURT: Well, why isn't that something that
25 would have been accomplished in discovery?

1 MR. HARTMANN: Well, because we don't know -- during
2 discovery we didn't know who would show up and who would not
3 show up.

4 THE COURT: Well, if they don't show up they won't
5 be showing up.

6 MR. HARTMANN: Right.

7 THE COURT: So why would you want their deposition?

8 MR. HARTMANN: Well, for one reason, because the
9 case is much more focused now than it was during discovery.
10 For another reason, because the discovery depositions were
11 very, shall I say, difficult. They were taken through
12 translators, and it was very convoluted, and some of the
13 testimony is, frankly, difficult to follow, whereas now we
14 have a very much more focused set of issues.

15 THE COURT: All right. Thank you, Mr. Hartmann.

16 Mr. Hnath, what is the Defendants' position on
17 depositions of its representatives?

18 MR. HNATH: Your Honor, I'm not sure if the
19 discovery depositions are inadequate, but we are willing to
20 work with VARTA's counsel if witnesses are unable to come, as
21 long as the request is reasonable and we have agreement in
22 terms of how the depositions will be taken, what the ground
23 rules will be and so forth and so on. So it's something that
24 if witnesses are unable to come, we are willing to work with
25 them on.

1 THE COURT: All right. Well, if the parties work it
2 out, then that is fine, and if you reach a dispute about it, I
3 will address it at that time.

4 MR. HARTMANN: Thank you.

5 MR. HNATH: Thank you, Your Honor.

6 THE COURT: All right. Thank you.

7 Are there any other issues about the witnesses that
8 either side intends to call, any objections to them, or
9 problems that the parties anticipate will be something that
10 will have to be resolved before trial?

11 MR. HARTMANN: Not that I'm aware of presently.
12 Thank you.

13 MR. HNATH: None from us, Your Honor.

14 THE COURT: All right. Very good.

15 I know that we have a couple of motions to argue. I
16 would also like to take up the motions in limine and the
17 exhibit issues.

18 First I wanted to go through a couple of items in the
19 pretrial order, and I don't know which side wants to speak to
20 this, but in the stipulations related to case management on
21 page 11 of the pretrial order, it refers to disputes about
22 demonstratives and then it says, "Any objections shall be
23 discussed and presented to the Court in the manner set forth
24 in paragraph 11," but paragraph 8 is the last paragraph of
25 that section. So if there is a manner that was to be set

1 forth in paragraph 11, it would be helpful to know.

2 MR. MUELLER: Yes, Your Honor. Apologies. I --
3 this was, as you can imagine, a making of sausage, and I
4 believe that actually the Defendants proposed some fairly
5 significant changes that we couldn't consider and get into the
6 pretrial order on these very issues. So I guess I would
7 suggest that the parties work out what those details might be
8 on exchange of demonstrative exhibits. We had agreed with
9 Defendants' counsel that any issue that wasn't addressed would
10 be worked on in good faith in terms of case management issues.

11 THE COURT: Well, certainly we can set a date for
12 you to meet and confer and file any additional stipulations
13 regarding case management. The main thing I wanted to add to
14 whatever arrangement you work out is to make sure that it
15 includes a provision that at the end of the meet and confer
16 process, if there are objections that have not been resolved
17 by that process, that there needs to be notice to the Court by
18 email to the law clerk by no later than 10:00 p.m. of the
19 evening before the issue is to come up.

20 Judge Gilstrap's practice is that he'll be in chambers by
21 no later than 7:30 every morning, with the idea that if there
22 are disputes that have not been resolved, they can be taken up
23 in that hour between 7:30 and 8:30 when the jury is expecting
24 to start back up. He wants to have information about any
25 unresolved disputes provided to chambers by 7:00 a.m. So in

1 the case of a dispute about a demonstrative, a copy of the
2 demonstrative and a short statement by each side about what
3 the issue is would be delivered to chambers by 7:00, and then
4 he would meet with counsel starting at 7:30 to resolve those
5 issues.

6 So that is -- whatever you agree to in terms of your meet
7 and confer process is up to you, how early you want to have
8 the information provided to one side, those are things that
9 certainly we hope you will agree on, but we want to make sure
10 that the back end contains what Judge Gilstrap needs to be
11 able to decide these disputes and not slow down the trial.

12 Does that make sense, Mr. Mueller?

13 MR. MUELLER: That makes sense to us, Your Honor.
14 Thank you.

15 THE COURT: All right. One other thing I wanted to
16 mention, and I think I'm reading your stipulations right, is
17 that they appear to say that any disputes about deposition
18 designations, what's to be presented to the jury, need to be
19 presented to the Court not the day before the use but the day
20 before that, so that -- so the Court can take them up the day
21 before they're to be presented to the jury. The concern is
22 that in cases in the past there have been problems editing the
23 depositions on a timely basis. If the dispute is not resolved
24 until the day they are to be used, sometimes that results in
25 delays, then, that affect the jury. So the intent is that the

1 Court is -- needs to hear the dispute the day before the
2 deposition is going to be used, and that typically means that
3 the parties have to meet and confer about it the day before
4 that. But anyway, I think that's what you've provided in your
5 stipulation.

6 All right. Unless there are some other questions about
7 trial management issues, I'd like to turn to the motions in
8 limine now. And I'll start with the Plaintiff's motions in
9 limine and hear from the Plaintiff about that.

10 MR. MUELLER: Thank you, Your Honor. Wes Mueller on
11 behalf of the Plaintiff VARTA Microbattery.

12 And I believe we're talking about the correct one in
13 the right sequence here, but there have been quite a few
14 agreements in the past day or two and we've proposed, you
15 know, ordering. And so if I'm not on the same page as you,
16 I certainly would welcome a heads up and let me know which
17 motion you would like us to address.

18 But the first one that is on my list is VARTA's request
19 for leave to modify the Court's Motion in Limine No. 9, which
20 is reference to copying.

21 THE COURT: I have that as your last motion in
22 limine, which would be your Motion in Limine No. 6, but I'm
23 happy to start there if -- it doesn't matter to me. I'm
24 looking at your Document No. 177, which is entitled
25 "Plaintiff's Opposed Motions in Limine."

1 MR. MUELLER: Okay. Thank you, Your Honor.

2 So Plaintiff's Motion in Limine No. 1, which was
3 regarding production capacity, has been resolved, and so it
4 is being withdrawn.

5 THE COURT: All right.

6 MR. MUELLER: Plaintiff's Motion in Limine No. 2,
7 which is to preclude testimony and argument about EVE's own
8 patents is a motion in limine that is still in play, and I'm
9 happy to address that one first, Your Honor.

10 THE COURT: All right.

11 MR. MUELLER: Okay. So for Plaintiff's Motion in
12 Limine No. 2 regarding reference to EVE's patents --

13 Bob, can we put up slide 70?

14 -- the problem with reference to EVE's patents or its
15 own patents in the abstract is we believe that it creates a
16 misimpression that EVE does not infringe because it has its
17 own patents. And the case law indicates it's not relevant to
18 the issue of infringement and not relevant to the issue of
19 willful infringement, and I believe that that concept is not
20 in dispute with respect to the Defendants' position.

21 And so if we look at slide 73, please.

22 What EVE's position is essentially, its expert witness is
23 intending to introduce testimony that the reasonable royalty
24 would be altered because EVE has a sizable portfolio of
25 patents concerning its batteries, and so, therefore, it ought

1 to pay less in terms of a reasonable royalty. But the problem
2 with that intended testimony is that it's only conclusory and
3 there's no evidence that any EVE patents actually cover its
4 coin cells. And Mr. Kline at his deposition so indicated that
5 he hadn't done any infringement analysis.

6 And so, therefore, what we submit is that testimony and
7 evidence about EVE's own patents, because it's not probative
8 to the question of infringement and because it has such a
9 great threat to cause a misunderstanding and a misimpression
10 in the minds of the jury, that it ought to be excluded.
11 That's essentially the Plaintiff's position.

12 THE COURT: Mr. Mueller, we routinely hear testimony
13 from the defendant's corporate representative that the
14 defendant is an innovator, that the defendant owns patents of
15 its own and respects the intellectual property of others. Are
16 you seeking to exclude testimony at that high a level?

17 MR. MUELLER: Not at that high level. And again,
18 one of the issues in this case we propose or intend to present
19 is that EVE willfully infringed the patents, and so we
20 acknowledge that the totality of the circumstances, such as,
21 you know, testimony about we're an innovator and we have, you
22 know, our own innovations is not something that we are seeking
23 to exclude with this motion in limine; more, it's directed to
24 EVE's particular patent portfolio covers its own patents
25 because, one, there's no evidence that that is the case; and

1 two, such evidence is so problematic in terms of its
2 prejudicial nature and confusion in the minds of the jury.

3 THE COURT: So what you're seeking to exclude would
4 be testimony or argument that EVE has patents that cover the
5 accused products?

6 MR. MUELLER: That's correct, Your Honor.

7 THE COURT: All right. And let me hear the response
8 to that.

9 MR. HNATH: Thank you.

10 And could we pull up slide 39 from --

11 So, Your Honor, we do not intend to argue that EVE does
12 not infringe because they have their own patents. We do think
13 that it's relevant for two reasons. First of all, under
14 *Georgia-Pacific*, the other side, Mr. Metzdorff, VARTA's
15 expert, has opined that other than claiming its superiority
16 over VARTA for certain product specifications, EVE has not
17 contributed any non-patented elements, manufacturing
18 processes, unique business risks, significant features or
19 improvements to the batteries that it's provided to customers.

20 In response, our damages expert, Mr. Kline, notes that
21 EVE's batteries have their own proprietary intellectual
22 property, that EVE has filed numerous patents covering their
23 coin cells--for example, they have approximately 97 relevant
24 patents and patent applications relating to their coin
25 cells--and, as a result, he opines that *Georgia-Pacific* factor

1 No. 13 would support a royalty rate towards the lower end of
2 the cost and income approach indicators.

3 So we believe that EVE's patents are relevant for two
4 reasons: No. 1, as one of the *Georgia-Pacific* factors; and
5 No. 2, as I think you've indicated, that we would want to
6 argue that EVE is an innovator, that they're not simply a
7 copycat, that they do have a sizable patent portfolio of their
8 own. We would expect that EVE's witnesses will tie together
9 those patents and their products if there's any evidentiary
10 gap there. And so we believe the evidence is relevant and
11 that should not be excluded.

12 THE COURT: And are you going to have any evidence
13 that EVE's patents cover the accused products?

14 MR. HNATH: Yes. So I think in and of itself the
15 fact that they have patents shows that they are also an
16 innovator, and so to that extent I'm not sure it's necessary
17 to show that the patents cover the accused products; but to
18 the extent that it relates to *Georgia-Pacific* No. 13, yes, our
19 witnesses will talk about the relationship between the patents
20 and EVE's products.

21 THE COURT: And is that evidence that's been
22 disclosed?

23 MR. HNATH: I'm not sure there's been any specific
24 request for it. We have provided a list of the patents.

25 THE COURT: So the -- obviously the fact that you

1 may have patents that cover some feature of the accused
2 products isn't relevant to the infringement issue, but you're
3 saying that the *Georgia-Pacific* factor 13 makes it relevant?

4 MR. HNATH: *Georgia-Pacific* factor 13, as I read it,
5 would not necessarily require us to make a direct link between
6 the patents and the accused products because the issue is
7 whether the party to the hypothetical negotiation comes to the
8 table with their own technology, with their own patents.

9 THE COURT: And remind me of what factor 13 is. I
10 know 15 is the hypothetical negotiation. I don't remember 13.

11 MR. HNATH: Factor 13 deals with whether--and I
12 believe it's alluded to by Mr. Metzdorff--whether a party has
13 contributed non-patented elements, manufacturing processes,
14 unique business risks, significant features, or improvements.
15 I believe that's pretty close to a paraphrase of GP factor 13.

16 THE COURT: And your argument is that the Plaintiff
17 opened the door to that by relying on factor 13 saying that
18 the Defendant hadnot contributed anything to the product?

19 MR. HNATH: Well, certainly they opened the door by
20 saying that they haven't contributed anything, but even if
21 they hadn't, I think that our expert could independently
22 analyze the *Georgia-Pacific* factors and look at factor 13.
23 But certainly this is in partial response to what their expert
24 has opined.

25 THE COURT: Well, I'm not sure whether what you've

1 described requires allowing the Defendant to discuss its
2 particular patents as opposed to the concept that the
3 Defendant has patents. The concern is, obviously, not wanting
4 the Defendant to be able to create the impression in the
5 jury's mind that EVE cannot be infringing the Plaintiff's
6 patent because they're practicing their own patent, and that's
7 not a valid defense to infringement.

8 MR. HNATH: We agree.

9 THE COURT: And so if you are going into details
10 about particular patents, I think that is a heightened
11 concern. If all you're going to do is talk about we have our
12 own portfolio of patents which concern coin cell batteries,
13 that's less of a concern.

14 What -- where on that spectrum does the testimony you
15 want to offer fall?

16 MR. HNATH: If we can talk about the number of
17 patents that they have relating to coin cells and that they
18 have patents, I think that would be adequate, Your Honor,
19 without getting into specific patents or specific patent
20 numbers.

21 THE COURT: And that would be the testimony that is
22 in Mr. Kline's report in paragraphs 226 through 230? That's
23 what you have on the screen?

24 MR. HNATH: It is. He says they have approximately
25 97 relevant patents and patent applications, yes.

1 THE COURT: All right.

2 Thank you, Mr. Hnath.

3 Let me hear back from Mr. Mueller about that.

4 MR. MUELLER: Thank you, Your Honor.

5 If we can switch so I can just show you slide 74, which
6 is from Mr. Kline's report.

7 So Mr. Hnath stated that Mr. Kline was simply saying that
8 EVE has numerous patents, but you can see he's saying that
9 there are numerous patents covering EVE's coin cells, and
10 that's the issue. There is no nexus to him saying that
11 they're covering.

12 So if he was simply to say EVE has filed numerous patents
13 relating generally to coin cells, we wouldn't love it but we
14 could live with it, but here we submit that he's going too far
15 with -- in the absence of any evidence such as expert
16 testimony explaining what or how or what these patents, you
17 know, relate to--are they U.S. patents, are they -- you know,
18 what they even are.

19 So that, again, is the issue that we have with Mr. Kline
20 talking about patents covering the coin cells, which certainly
21 gives the impression that they're practicing their patents.

22 THE COURT: All right.

23 MR. HNATH: And Your Honor, we can live with that
24 compromise. We would say 'relating but not covered'.

25 THE COURT: All right. So I'm going to grant

1 VARTA's MIL No. 2, but note that it does not exclude
2 Defendant's witnesses from testifying about the Defendant
3 being an innovator that owns patents, and can include that
4 the Defendant has 97 patents relating to coin cells, but the
5 Defendant will not be permitted to testify that those patents
6 cover the accused coin cells. If that doesn't properly
7 capture it, let me know. All right?

8 MR. MUELLER: Thank you, Your Honor.

9 Your Honor, then just continuing down our list of
10 Plaintiff's motions in limine, we've talked about No. 2.

11 No. 3, 4 -- Nos. 3 and 4 have been agreed to and
12 withdrawn, so I believe we're now at No. 5, which is VARTA's
13 request for leave to modify Court MIL No. 6, which is
14 reference to IPR denials and final decisions.

15 THE COURT: So the MIL No. 4, the one about the
16 Higuchi coin cell, that has been resolved?

17 MR. MUELLER: Yes; late last night, Your Honor.

18 THE COURT: And is -- do we need to put in the
19 record what the resolution is, or that you're just no longer
20 asserting that.

21 MR. MUELLER: Well, I believe the resolution is
22 going to be that the Defendant can refer to a redesigned coin
23 cell, but it will not be referring to the Higuchi coin sell.
24 And --

25 THE COURT: You know, that's exactly what I had

1 written down.

2 MR. MUELLER: Okay. Well --

3 THE COURT: I'm glad to see that reasonable minds
4 are agreeing. All right.

5 MR. MUELLER: And counsel, I'm not sure if I'm
6 leaving something out of that agreement.

7 MR. HNATH: Your Honor, it's part of an omnibus
8 agreement in which the parties withdrew their *Daubert* motions
9 as to the economic experts, so it's part of an overall
10 agreement.

11 THE COURT: As long as it's in writing and both
12 sides know what it is, then I'm fine; we don't need to put it
13 on the record.

14 MR. HNATH: That's fine with us, Your Honor. There
15 was an extensive email exchange, and I think everybody's clear
16 as to what the agreement was.

17 THE COURT: All right.

18 MR. HNATH: Thank you.

19 THE COURT: So we're on to the request to modify the
20 standard MIL 6?

21 MR. MUELLER: Yes. And Mr. Wittman will be
22 addressing that.

23 THE COURT: All right.

24 MR. WITTMAN: So, Your Honor, there are a number of
25 *inter partes* reviews that have been filed in this case by the

1 Defendant EVE, and we wanted to address the extent to which
2 those *inter partes* review proceedings can be introduced.

3 And -- well, let me go back. So we sort of -- in our
4 brief did sort of a red line of what we were contemplating
5 with respect to the proposed modification, which would be to
6 keep the ongoing proceedings, meaning those proceedings which
7 are interim proceedings for which there has not been some kind
8 of a final decision, to continue to preclude evidence or
9 argument or testimony with respect to those interim IPRs while
10 allowing reference to concluded proceedings where there has
11 either been a final written decision or a denial of
12 institution at the Patent Office. And I have sort of
13 summarized our position here on slide 31.

14 And by way of background, I think it's important to note
15 that EVE is, to our understanding, intending to rely on advice
16 of counsel in defense of VARTA's allegations of willful
17 infringement. And there are, for example, two U.S.
18 opinions--one which I can --

19 Well, maybe before I do that, Your Honor, since we are
20 going to be going into some confidential material, I don't
21 know if it's appropriate to ask if the -- at least on the
22 record that the courtroom be closed. I don't -- there is
23 nobody here that's not authorized under the protective order,
24 but just as a formality.

25 THE COURT: Well, I'll note that you're right, there

1 is nobody in the courtroom, so I don't think there's a need to
2 close it, but I'll note that you requested it.

3 MR. WITTMAN: Thank you, Your Honor.

4 So there are two U.S. opinions, and one of those opinions
5 was issued by the Rimon law firm, and that opinion is from
6 November of 2021. [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED].

13 There was a second opinion that was issued by Mr. Bejin,
14 another attorney here in the U.S., and that's back from
15 September of 2018, [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED].

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 a jury, [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 THE COURT: What were the dates upon which those
8 determinations by the PTAB became final?

9 MR. WITTMAN: Sure. So the first '581 final written
10 decision, which is shown here on slide 34, was August 8th of
11 2022. The second decision for the '581 Patent, which was a
12 denial of institution, is dated March 14th of 2023. And here
13 the denial of institution for the '905 Patent was March 14th
14 of 2023. And I don't have the -- offhand the exact date for
15 '869, but that was right around that same March time period, I
16 believe.

17 THE COURT: So these are well after the institution
18 of the lawsuit. Your argument is that at that point the
19 infringement became willful?

20 MR. WITTMAN: Well, no. So with respect to the --
21 we allege willful infringement basically from the date of
22 issuance of the earliest patents that that willful
23 infringement is ongoing post-complaint and to this lawsuit.

24 So we certainly intend to argue that the opinions
25 themselves were -- had competency problems and that the

1 opinions do not -- are not sufficient for EVE to have formed a
2 good faith belief that it was not infringing the patents, but
3 beyond that, we believe that these final written -- the final
4 written decision and the denials of institution are further
5 evidence of the unreasonableness of EVE, and that even if --
6 even if the fact finder were to conclude that EVE's initial
7 reliance on the opinions of counsel was reasonable, that once
8 these decisions came from the Patent Office, that any reliance
9 on those opinions became unreasonable.

10 THE COURT: If the decisions that you're seeking to
11 admit are admitted, why shouldn't other decisions that did not
12 go your way be admitted also?

13 MR. WITTMAN: So -- well, one, I'm not sure that we
14 really agree with the characterization that any decision has
15 not gone our way at this point. There were -- there are a
16 number of patents for which institution was granted.

17 THE COURT: And doesn't the decision to institute
18 mean a finding that it is likely to be granted?

19 MR. WITTMAN: Well, the institution decision is a
20 granting of the petition and is a granting of the IPR, but it
21 is an interim decision that is made under a very low standard
22 under 35 U.S.C. § 314 that simply requires a reasonable
23 likelihood that the petitioner would prevail with respect to
24 at least one claim, not necessarily all claims.

25 And in this case we would also note that the Patent

1 Office in the institution decisions specifically mention that
2 VARTA had cast doubt on EVE's theory. But again, because
3 those decisions are interim, there has been no final decision,
4 we do not believe it is appropriate for those to be put before
5 the jury.

6 THE COURT: Frankly, the hardest decisions about
7 admission of evidence about PTAB activities, in my mind, deals
8 with whether the defendants have a right to introduce evidence
9 even of non-final opinions when they're being charged with
10 willful infringement. But to split it the way you're
11 suggesting and allow the admission against them of the
12 petitions that went against them, whereas not allowing
13 admission of the ones that may go their way that are still in
14 the works seems problematic to me in terms of a willfulness
15 claim.

16 If the Plaintiff is maintaining its claim of willful
17 infringement, I don't see how we can cut it the way you're
18 suggesting it should be cut here, but I'll -- I don't know
19 that I know everything I need to know about the proceedings
20 yet. We've got some other issues about willfulness that are
21 going to come up over the course of this. But let me go ahead
22 and hear from EVE on this issue, and I'll give you a chance to
23 respond.

24 MR. WITTMAN: Thank you, Your Honor.

25 THE COURT: Thank you.

1 MR. HNATH: Thank you, Your Honor.

2 Could we bring up slide 40?

3 So a couple of things. First of all, in terms of VARTA's
4 need to introduce evidence of the IPRs, to the extent that
5 they want to introduce them to show that prior art was
6 considered by the Patent Office, we've withdrawn our
7 invalidity defense, so I think that ground is moot.

8 To the extent they're looking to introduce the IPRs as --
9 to say that the Patent Office eventually disagreed with the
10 statements in the opinions of counsel, we would disagree that
11 it's relevant for that purpose because, in evaluating the
12 opinions of counsel, the issue is whether the opinion was
13 thorough, whether it was well-reasoned, whether it was done
14 by competent counsel, not at the end of the day whether the
15 counsel was correct or not. So we don't view it as relevant
16 whether the PTAB eventually disagreed with the opinions of
17 counsel; that seems to us to be an irrelevant sideshow.

18 They are relevant, however, to the issue of willfulness.
19 And VARTA has said that they are going to raise the
20 willfulness issue. They said they are going to raise issues
21 about EVE's conduct before these patents issued. And to that
22 extent it's very relevant for EVE to be able to say we believe
23 that these patents are invalid and the PTAB has issued a
24 decision saying there's a reasonable likelihood that the
25 petitioner would prevail.

1 So under the totality of circumstances test and
2 willfulness, we do believe that it's relevant for EVE to
3 be able to cite the granting of institution for some of
4 these patents.

5 At a minimum, if VARTA is allowed to introduce any
6 evidence of the IPRs, then any consideration should be fair
7 and equitable to both sides and permit discussion of both
8 institution and denial decisions, to the extent they're
9 relevant, and the context surrounding both.

10 THE COURT: Mr. Hnath, I don't know that I've ever
11 seen a case maintaining an opinion of counsel defense where
12 the invalidity defense has been dropped; in other words, that
13 the opinion of counsel was invalidity, but that the client
14 party is not asserting invalidity at trial.

15 MR. HNATH: We would -- number one, we did in the
16 -- I believe in the pretrial order make a reservation that
17 while we're not going to argue invalidity per se as a defense
18 to infringement, we do reserve the right to argue invalidity
19 based on the opinions of counsel--in other words, that counsel
20 rendered opinions that the patents are invalid. I would
21 suggest, Your Honor, that that is relevant to willful
22 infringement even though we've withdrawn our invalidity
23 defense.

24 THE COURT: Well, when you say 'argue invalidity',
25 what do you mean by that?

1 MR. HNATH: What I'm saying is that we should be
2 able to say that competent counsel rendered an opinion that
3 certain patents were invalid and, therefore, EVE proceeded to
4 continue to sell their product based on reliance on that
5 opinion of counsel. I don't think that requires you to get
6 into the merits of the invalidity case. As I said before,
7 what's relevant is that they got an opinion from competent
8 counsel who analyzed the issue and came to that conclusion.

9 THE COURT: Well, are you proposing to introduce the
10 opinion itself, the letter from counsel?

11 MR. HNATH: Yes, Your Honor, we are. It's on our
12 exhibit list.

13 THE COURT: Okay. That does get into the merits of
14 it, then, doesn't it?

15 MR. HNATH: It -- again, I believe the law is that
16 -- and I think Mr. Curtin was going to discuss this further in
17 connection with the *Daubert* motion on Doctor Horn, but as I
18 understand the law, it's not whether the opinion was
19 ultimately correct or not; the issue is based on the opinion
20 itself, the four corners of the opinion, is it a competent
21 opinion of counsel. And I think for that purpose you don't
22 need to get into the merits of whether the opinion was
23 correct; the question is did they look at the issues fairly,
24 did they reach a certain opinion, was it a well-reasoned
25 opinion, and so forth. They can attack the competency of

1 the opinion, but in terms of whether the patents are, in fact,
2 invalid or not is really irrelevant. The issue is whether the
3 attorneys did an adequate analysis and rendered an opinion on
4 that basis.

5 THE COURT: I would agree that I think the law sets
6 a relatively low bar for the admission of an opinion of
7 counsel for that defense and that it's then up to the jury to
8 decide whether it was reasonable for the client to rely upon
9 that in their decision to go forward with their product, but I
10 just am saying that it -- I haven't had to deal with an issue
11 where the client was not maintaining invalidity at trial but
12 was relying on a defense of counsel about invalidity.

13 MR. HNATH: As a defense to willful infringement.

14 THE COURT: Yeah. I understand. It's just an
15 unusual situation.

16 All right. Thank you.

17 MR. HNATH: Thank you, Your Honor.

18 MR. WITTMAN: Your Honor, just a couple of quick
19 points.

20 One, we do not, you know, fully agree with EVE's
21 assessment on the competency and the opinion of counsel issue.
22 We do think--and Mr. Mueller will be addressing this in more
23 detail a little bit later in the context of a motion that -- a
24 motion to exclude our technical expert Doctor Horn--but that,
25 in our view--and this has been briefed--we believe the

1 competency of the opinion is very much at issue.

2 Also, again, so -- and we believe that the Patent Office
3 decisions are relevant, again, because the Patent Office
4 disagreed with the assessment that were made by the opinion
5 counsel, and at a bare minimum, bare minimum, once those
6 decisions came in from the Patent Office they cast serious,
7 serious doubt on the opinions that had been rendered by the
8 U.S. attorneys.

9 I will just also note a point you raised, Your Honor,
10 that we are right now, frankly, grappling with the fact they
11 dropped invalidity but they are relying on opinions of counsel
12 on the issue of validity in defense of willful infringement.
13 And I don't have a -- you know, a specific answer as I stand
14 here, but it also occurs to us to be somewhat problematic in
15 how the fact finder is going to evaluate the reasonableness of
16 those opinions. But perhaps that is an issue that can be
17 addressed through some jury instruction, which, you know,
18 we're considering.

19 Unless Your Honor has any further questions.

20 THE COURT: Well, let me ask you, Mr. Wittman, if
21 the Court were to decide that it would not be appropriate, in
22 view of the willfulness defense, to admit the conclusion of
23 the PTAB on the matters that you're seeking to introduce
24 without also allowing evidence about the ongoing proceedings,
25 would your position be that it's better to let everything in

1 or not?

2 MR. WITTMAN: One second, Your Honor.

3 Then it would be our preference that they both come in.

4 THE COURT: All right. I will consider that. Thank
5 you.

6 MR. WITTMAN: Thank you, Your Honor.

7 THE COURT: Mr. Hnath, do you have an opinion on
8 that question?

9 MR. HNATH: I thought I was going to be next on that
10 one, Your Honor.

11 If that is the choice, I think our preference would be to
12 let everything in and let the parties make their arguments to
13 the jury.

14 THE COURT: All right. I will consider that and
15 I'll carry this MIL at the moment, but I want to look further
16 at it.

17 That takes us to the MIL about copying, I believe.

18 MR. MUELLER: Thank you, Your Honor.

19 This is Plaintiff's request to modify Court's MIL No. 9
20 to allow the use of the term 'copying' in the trial to -- with
21 respect to the issue of willful infringement. And when we
22 first submitted our paper, the issue of invalidity was also on
23 the table, and so we believe that the issue of copying is
24 relevant to both. But since invalidity is no longer at issue,
25 we submit that we -- the Plaintiff should be permitted to

1 refer to 'copying' because that is evidence that the
2 Defendant's infringement here was willful.

3 THE COURT: Well, you know, this standing MIL comes
4 from concern that parties not use the term 'copying' when what
5 they're really talking about is just infringement, because the
6 Federal Circuit has made clear in a variety of cases that
7 copying is not just infringement; that copying requires
8 evidence that there be an effort to replicate a specific
9 product. I think that was some of the early characterization
10 the court used, and more recently they've expanded that or
11 clarified that it can be not just replicating a product, but
12 after access to some technical non-public documents of the
13 plaintiff developing a product, building on that work, based
14 on that work. But, in other words, it actually requires
15 evidence that there is access to the work or the products of
16 the plaintiff and then a reliance on those.

17 Is that the kind of evidence that you have?

18 MR. MUELLER: Well, Your Honor, if we can go quickly
19 to slide 53, this comes from [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]. And those were allowed

1 to be used, or that entire industry was created by virtue of
2 this battery that was highly efficient yet extremely small
3 that could be inserted into the ear shell of -- you know, of
4 humans to, you know, listen to their iPods and their music
5 while -- you know, while carrying their iPhone.

6 And so if you go on to the next slide, slide 54, [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED].

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 And so when you look at the process in which they came up
24 with their design with the VARTA battery, you know, at -- on
25 the engineering workbench, we submit that there is sufficient

1 evidence and access to VARTA's product and that it -- a jury
2 could conclude from that evidence that there was intentional
3 copying on the part of EVE.

4 Now, you can see on the next slide, slide 55, where our
5 expert, Doctor Horn, considered the issue and he basically --
6 I'm summarizing this. It's not laying out all of the
7 paragraphs that he goes into detail in looking at their
8 documents in which he also concludes that [REDACTED]

9 [REDACTED]
10 [REDACTED], and so they moved to a
11 design that was basically a copy of the VARTA patent.

12 And so that's in a nutshell the evidence. We submit that
13 it is sufficient for a jury, again, to conclude that there was
14 copying and, therefore, we would request that the Court allow
15 us to refer to that in the context of demonstrating that the
16 Defendant's infringement was willful.

17 Thank you, Your Honor.

18 THE COURT: All right. Thank you, Mr. Mueller.

19 MR. CULBERTSON: If we could go to slide 22, please,
20 Mr. Curtin.

21 Your Honor, Geoff Culbertson.

22 EVE opposes the request to modify the Court's standing
23 motion in limine precluding the party from characterizing the
24 other as copying. The only basis for it, as counsel
25 acknowledged, is the allegation of willfulness, and that

1 copying is relevant to willfulness, and the Court was no doubt
2 mindful of that when it crafted this motion in limine; what
3 the law was on willfulness and what copying's relevance was to
4 that, yet it determined it was appropriate to have the
5 standing order of preclusion of a party using the term
6 'copying' or characterizing a party as that without first
7 obtaining leave.

8 And that's all we're asking for here is just don't give
9 them a license to stand up in opening and start throwing
10 around the term 'copying'. If at the end of the case they've
11 put on evidence from which the jury could conclude that,
12 that's one thing, but there's no case-specific reason here to
13 set aside the Court's standard procedure and standard practice
14 that it developed in its motion in limine.

15 There was a suggestion --

16 THE COURT: Well, I guess -- Mr. Culbertson, I guess
17 they are asking for leave now. It's true they're doing it
18 pretrial, but why shouldn't they be allowed, if they have
19 actual evidence of copying, to be -- to present that?

20 MR. CULBERTSON: They have evidence of what they
21 characterize as copying. EVE will present evidence that we
22 think shows significant differences in the designs and the
23 figures that you just saw that we characterize as something
24 other than copying. And so the concern is that they can put
25 on their evidence, they can put on their case, they can show

1 those documents, they don't have to use the word 'copying',
2 they don't have to characterize them as being a copycat in
3 opening, because that term is so prejudicial, which is the
4 exact reason that I believe the Court developed the motion in
5 limine.

6 THE COURT: I don't know that I've ever seen a
7 case where [REDACTED]
8 [REDACTED],
9 and I'm -- I know that the intent of this MIL was to avoid the
10 use of the term 'copying' for -- as a substitute for
11 infringement; just a conclusion drawn from the fact that the
12 Plaintiff maintained that the claims cover the accused
13 product; [REDACTED]
14 [REDACTED]
15 [REDACTED], I think that the Court does not intend to
16 prevent the use of the word 'copying'.

17 Is there anything else that you believe is improper about
18 the way they're characterizing this evidence?

19 MR. CULBERTSON: It's just the prejudicial effect of
20 it. And, of course, EVE will have its own testimony about
21 those documents and its own evidence about what those
22 documents show, which will be that they're not copies. And so
23 the concern is they can put on their evidence that, yes, this
24 was in their possession; yes, you see what you see here; but
25 the parties have differing views of what that is. And when we

1 start throwing around terms like 'copying' and 'trespassing'
2 and 'stealing', we believe we get into the 403 territory that
3 that's unduly prejudicial.

4 THE COURT: Well, I'm not going to relieve the
5 Plaintiff of any of the other terms that are covered in
6 standing MIL 9, but I am going to grant their Motion in Limine
7 No. 6 to allow them to use the term 'copying' in connection
8 with the evidence that they've described. And I am going to
9 say that they are required to either not use that term or to
10 present the evidence they've shown. In other words, don't use
11 the term in your openings and not put on this evidence. But
12 with the understanding that you're going to be putting this
13 evidence on, I find that that is a basis to refer to it as
14 copying.

15 MR. CULBERTSON: Any further questions for me, Your
16 Honor?

17 THE COURT: No, Mr. Culbertson. Thank you.

18 MR. CULBERTSON: Thank you.

19 THE COURT: All right. I think that takes us to
20 the Defendant's motions in limine. And this is probably a
21 good place to take the morning recess, so we'll take a
22 15-minute recess and come back. Thank you.

23 (Brief recess.)

24 THE COURT: Thank you. Please be seated.
25 And we'll move onto the Defendant's motions in limine.

1 MR. WANG: Thank you, Your Honor.

2 This is -- really we have a motion for supplemental claim
3 construction really related to MIL No. 1. So this is about
4 the inconsistent position VARTA took between their IPR
5 proceeding and here in this litigation.

6 I will please go to the slide No. 3 to start with.

7 Yeah. So the -- this is about the term 'the house cup
8 and the house top held together by a force-fitting
9 connection.' This is in the three patents-in-suit, since
10 '835 was no longer in this litigation, so just to mention
11 that, in the '581 and the '913 Patent for this term.

12 So the proposed construction we put here is 'the house
13 cup and the house top held together exclusively by a
14 force-fitting connection and excluding any other mechanism,
15 such as spring-load arrangement, adhesives, or crimping that
16 closed or held together the button cell'. We believe this is
17 consistent with the position VARTA took in their IPR
18 proceeding.

19 No. 4, please.

20 So VARTA clearly disavowed crimping in its IPR
21 preliminary response. It reads, quote, "The '518 Patent
22 distinguish button cell held together by crimping from those
23 held together with a force-fit."

24 Also in another -- two additional preliminary response,
25 you know, regarding '835 and '913 have the same language in

1 there, they have a provide explanation. They said, quote,
2 "The '518 Patent describe a cell house top and a cup closed
3 with force-fitting connection, one closed by force-fit. The
4 house top and the cup are held together by exerting radial
5 pressure on the casing area of the cup near the cup edge to
6 hold the house cup and the cup together -- housing and the cup
7 together by static-friction force." This language, it's in
8 the three preliminary responses filed by VARTA.

9 Similarly --

10 Page 5, please.

11 Similarly, VARTA disavow the spring-load arrangement,
12 adhesive, and the beading over regarding the -- held together
13 by a force-fitting.

14 Page six, please.

15 VARTA use exclusively and only numerously to explain
16 'held together' by force-fitting connection. For example, in
17 the -- again, their preliminary response to the IPR petition,
18 it says, '581 Patent described it is also possible to
19 manufacture button cells in which the cell cup and the cell
20 top are held together in axial direction exclusively by
21 force-fitting connection. This language show up in all three
22 preliminary responses.

23 Also it mentioned, quote, "This ensures that the cup and
24 the top are held together in a preferred manner, essentially
25 only by static-friction force." The same language show up in

1 all three preliminary responses.

2 Page 7, please.

3 VARTA showed how the cup and the top are held together by
4 a force-fitting connection in a produced -- reproduced figure
5 5. It's explained, "To achieve sufficient friction for a
6 force-fit, the external and internal radii of the cup and the
7 top should be matched to one another to the thickness of the
8 film seal." It also show in blue in the picture.

9 All those explanations and arguments make the PTAB
10 conclude 'held together by a force-fitting connection' is held
11 together by a particular condition must be a battery casing
12 whose half paths would no longer be held together if the
13 condition were not present.

14 So basically, according to the PTAB decision, a
15 force-fitting connection is a particular condition held
16 together by a force-fitting connection, it's basically saying
17 held together by a particular condition and then no longer be
18 held together if a particular condition is gone.

19 Page 9, please.

20 Further, the PTAB also said, "whatever a force fitting
21 connection is, a battery made in accordance with the teaching
22 of the prior art is not a battery that is held together by a
23 force-fitting connection, unless the battery would seize to be
24 held together in the absence of the force-fitting connection."
25 So again, the 'held together by force-fitting connection'

1 equal to cease to be held together absent a force-fitting
2 connection.

3 This is the position our expert took in his rebuttal
4 report dated May 22nd. We -- you know, we start to sense
5 VARTA going to switch their position in the deposition for our
6 expert -- technical expert Marc Juzkow. And later on we met
7 and conferred with VARTA counsel and we find out they're going
8 to take a different position at the trial. That's why we --
9 rather than let the jury to figure out what is actually this
10 'held together by force-fitting connection' means, we ask the
11 Court to clarify.

12 THE COURT: Can you show me something, Mr. Wang,
13 where VARTA told the PTAB that the relevant claims of these
14 patents require that the battery only or exclusively use a
15 force-fitting connection?

16 MR. WANG: The held together -- I mean,
17 consistently, you know, 'held together by a force-fitting
18 connection', it's a patent term in the -- in those, you know,
19 relevant patents. And I believe the Federal Circuit saying
20 the relevant argument and the claim amendment can be, you
21 know, disavowed, used to disavow this term. And that there's
22 no -- I mean, through all the preliminary responses VARTA
23 filed, they consistently took a position this 'held together
24 by force-fitting' is not a crimping, not -- I should say
25 spring-load arrangement, not adhesive, and explained several

1 times this is a exclusive -- let me get the specific language
2 there. It's saying it is exclusive -- it's in the aerial
3 direction exclusively by force-fitting connection and
4 essentially only by static-friction force.

5 THE COURT: And are those sentences describing
6 the asserted claims or are they just talking about various
7 embodiments in the specification?

8 MR. WANG: This -- the 'held together by
9 force-fitting' is a claim term. When they explain what is
10 held together by a force-fitting connection, it's essentially
11 explaining the claim term. And this is also make -- the PTAB
12 reached a decision and that the PTAB decision consistent with
13 their explanation. They say it's a particular condition that
14 held two part together.

15 THE COURT: All right. Thank you, Mr. Wang.

16 MR. WANG: You're welcome.

17 MR. WITTMAN: So just a few preliminary points.

18 VARTA has not taken an inconsistent position. VARTA has
19 taken the very same position throughout the litigation and the
20 IPRs in the Patent Office that it is the claim language that
21 controls, and the claim language says that the cup and top are
22 held together by a force-fitting connection.

23 It was actually EVE that took inconsistent positions.
24 During the IPRs in the Patent Office, EVE took the position
25 that a crimp inherently resulted in a force-fitting

1 connection. In the litigation they're taking the exact
2 opposite position that any type of a band or a crimp prohibits
3 a force-fitting connection.

4 The other point I wanted to make is that our position has
5 not changed since we filed our infringement contentions back
6 in March of 2022. There has been no recent change in the
7 position that has been taken by VARTA. VARTA has stayed true
8 to its infringement contentions that it served early on in
9 this case.

10 And if -- to just turn to our opposition for a moment, we
11 do believe that this issue can be resolved in the context of a
12 waiver because of the fact that this issue is not a new issue,
13 this is an issue that could have been raised by EVE during the
14 claim construction process had it elected to do so.

15 And then, briefly, I'll also just talk about the merits
16 that even if the Court were to consider what happened during
17 the IPR proceedings, the construction that's proposed by EVE
18 would not be appropriate.

19 So this is just a little bit of a simplified timeline
20 with the district court proceeding events on the top and the
21 events in the IPR proceedings on the bottom. And the two
22 events that are highlighted in yellow are basically what are
23 relevant for purposes of waiver. The statements that VARTA
24 made in its preliminary response, which, you know, VARTA
25 believes do not result in any waiver at all, but to the extent

1 that EVE argues those statements constitute any kind of a
2 disclaimer or disavowal of claim scope happened in December of
3 2022, and specifically on December 15th, which was before any
4 of the claim construction briefing had even taken place in
5 this case. Varta filed its opening brief in January, January
6 24th, and EVE didn't file its claim construction brief until
7 February 7th. So if EVE was going to raise this issue, this
8 issue should have been raised by -- at -- during claim
9 construction.

10 The issue was raised for the first time in their motion
11 in limine, which was filed on July 17th after all of the
12 expert reports had been filed, after the expert depositions
13 had been taken, after *Daubert* and summary judgment motions.

14 And so the bottom line is, we simply think this is not
15 being timely presented, and we would ask that it be deemed a
16 waiver.

17 And I did just want to -- turning, you know, more
18 towards their proposed construction itself, I put up an
19 exemplary claim from one of the patents that was the subject
20 of the IPRs, and the claim language is pretty straight
21 forward--'the housing cup and the housing top are held
22 together by a force-fitting connection'. What is below this
23 is EVE's construction. And basically all of the text in the
24 light Brown is the text that EVE wants to read into the claim,
25 which not -- for it to be exclusively a force-fitting, and

1 then excluding any mechanism such as a spring-loaded
2 arrangement, adhesives, or crimping that closes or holds
3 together the button cells.

4 None of that latter text is even in the specification.
5 The closest the specification comes is talking about beading
6 over a cell, which is a way of closing it versus
7 force-fitting, but even then the specification never says that
8 those two are mutually exclusive or exclusive for one another,
9 meaning you can have a force-fit, and you could have a cell
10 that is closed by beading over. So there is no support in the
11 specification for any of this latter text.

12 Exclusively -- in preferred examples the specification
13 does talk about 'exclusively held together by a force-fit'.
14 VARTA did not rely on those preferred examples in the IPRs.
15 VARTA did have portions of its IPR responses where we
16 summarized the patents and part of that summary talked about
17 the various embodiments, including, you know, 'exclusively by
18 a force-fitting connection', but that language was also
19 proceeded by, you know, words like 'preferably', and again,
20 was only in the context of a summary of the patent, not the
21 claims and not in any argument that was used to distinguish
22 over the prior art.

23 THE COURT: Did the PTAB go on to say at some point
24 that 'held together' meant that in the absence of the
25 force-fitting connection the cup and the top would come apart?

1 MR. WITTMAN: Well, they didn't -- they -- no. So
2 if I go to the -- what the PTAB actually said, they said a
3 couple of things. First, they said, We don't need to construe
4 this term. They're talking about the term 'force-fitting
5 connection'. And this is an example from one of the -- from
6 the '581 Patent decision denying institution. They went out
7 of their way to say that they did not need to construe the
8 term to basically decide whether or not to institute a trial
9 at the PTAB.

10 THE COURT: And that's the full term--'held together
11 by a force-fitting connection'?

12 MR. WITTMAN: The cup -- yeah, the cup and top held
13 together by a force-fitting connection, yes. That is the
14 term. And that's shown here on the bottom in the sentence
15 just above -- yeah, the sentence above where the red underline
16 is in the text.

17 THE COURT: And what was the context in which they
18 went on to say that if something is held together by a
19 particular connection, that means that in the absence of that
20 connection it would not stay together?

21 MR. WITTMAN: Sure. So this is a statement by the
22 PTAB, which I have on this page, and this, again, is from the
23 '581, but there's a similar statement in the '913 decision not
24 to institute. And what the Patent Office said is, "Without
25 some evidence to the contrary, a battery casing whose half

1 parts are held together by a particular condition must be a
2 battery casing whose half parts would no longer be held
3 together if the condition were not present."

4 The key there is where they said without some evidence to
5 the contrary'. And the reason that the Patent Office is
6 making that statement is EVE presented prior art. One was a
7 Kobayashi reference; a second reference was a Brown reference.
8 Both of those showed a cell that was crimped over. There is a
9 third reference construction that describes closing a cell
10 with a spring-loaded mechanism or an adhesive, and those are
11 the closure methods that are expressly described and shown in
12 those references.

13 Eve, however, was relying on inherency, contending that
14 even though those references did not explicitly describe a
15 force-fitting connection; they inherently resulted in a
16 force-fitting connection. And the problem with EVE's
17 petitions, they didn't provide any evidence that inherency
18 was met, other than attorney argument. There was no evidence
19 presented that those references also had a force-fitting
20 connection.

21 And that is the portion of the Patent Office's decision
22 over to the right where they say that "The petitioner"--EVE--
23 "offers only attorney argument for the proposition that such a
24 process creates a battery casing that is held together by a
25 force-fitting connection."

1 VARTA never argued and the Patent Office never found that
2 because those references had some other closure mechanism,
3 like a beading over, they could not have a force-fitting
4 connection. That was never argued and that was never found,
5 and so there is no disclaimer to the effect that would support
6 the construction that has been offered by EVE.

7 THE COURT: All right.

8 MR. WITTMAN: Yeah. And again, I do just want to
9 reiterate -- and essentially on the merits EVE is taking the
10 position that VARTA contended that a force-fit and any other
11 closure mechanism were mutually exclusive. That is not a
12 position that was ever argued. That was not a position that
13 was ever found by the PTAB.

14 And again, we did -- just one final point, Your Honor.
15 At the end, and we've cited the authority, the *Shire*
16 *Development v. Watson Pharma* case, that disclaimer only
17 applies to unambiguous disavowals, and we would submit
18 that there is no disavowal at all, certainly no unambiguous
19 disavowal that would support EVE's proposed construction.

20 That's all I have, Your Honor.

21 THE COURT: Thank you, Mr. Wittman.

22 Go ahead, Mr. Wang.

23 MR. WANG: Thank you, Your Honor.

24 Just I want to make a couple of clarification.

25 Claim estoppel really, you know, means whatever VARTA

1 explained, you know, this term to the word is what it meant,
2 should be held, you know, to the later proceeding, meaning
3 whatever they explained in the PTAB proceeding, including the
4 preliminary response, is a official document; it's not a claim
5 amendment. Whatever they explained what the term means is how
6 to be -- you know, it can be considered, you know, disavowed.

7 In the preliminary response, VARTA never gave a second
8 meaning about this 'held together by a force-fitting
9 connection'. The only thing they talk about is, you know,
10 static-friction on the side direction, horizontal direction.
11 So -- and the PTAB -- you know, according to that, the PTAB,
12 you know, explained what it should mean, 'held together by a
13 force-fitting connection', and we rely on that meaning in our
14 expert --

15 THE COURT: But that meaning cannot be a disclaimer
16 or a disavowal by the Plaintiff.

17 MR. WANG: The -- you know, the meaning, they
18 explained that, what that meaning is--'held together by a
19 force-fitting connection'.

20 THE COURT: The PTAB may have said what it said,
21 but you're proceeding here on an argument that VARTA has
22 disclaimed scope, and I don't see you citing any statement by
23 VARTA that disclaims it.

24 MR. WANG: Uh-huh. The VARTA saying this is
25 distinguished from a crimping, both of the patents, from those

1 held together with force-fit, so they clearly disavow the
2 crimping. And also they explain what is held together by a
3 force-fitting connection, they consistently saying this is a
4 -- describe a cell top and cup closed with a force-fit
5 connection -- one closed by a force-fit, house top and a cup
6 held together by exerting radial pressure on the casing area
7 of the cup, near the cup edge, to hold a house cup and -- a
8 housing and a cup together by a static force. They
9 consistently explained that way. So, you know,
10 that -- because of that, the PTAB denied institution of those
11 three patents, so they should be held to that explanation to
12 the word.

13 Alternatively, alternatively, even, you know, from a
14 plain and ordinary meaning sense, the PTAB, you know,
15 considered the explanation that way. So we believe even plain
16 and ordinary meaning should construe to be the way we present
17 it, meaning it just -- a particular condition, you know, and
18 held two pieces together when the condition's not present,
19 those two pieces are not held together. And that condition
20 exclude the crimping and spring-load arrangement, adhesive
21 connection. And we do not ask the Court here to construe the
22 'force-fitting connection'; we just ask Court to construe the
23 'held together by a force-fitting connection'.

24 THE COURT: You are trying to argue, as I understand
25 it, that this phrase 'held together by a force-fitting

1 connection' should be construed to mean 'held together
2 exclusively by a force-fitting connection'?

3 MR. WANG: I mean, we believe this is -- this
4 language is consistent with the PTAB's explanation, it's held
5 together by a particular condition; it's not more than one,
6 it's just a particular condition, and when this condition is
7 not present, those two pieces are no longer held together, and
8 at -- this particular condition certainly does not include a
9 crimping and spring-load arrangement and adhesive connection.

10 THE COURT: You know, these are comprising
11 complains, are they not?

12 MR. WANG: The -- this particular term actually is
13 -- it's embedded in the, you know, certain claim language of
14 the particular claims of the three patents, or now actually
15 two patents are relevant in this case. And, you know, yeah,
16 our position is they, you know, explained this to one way;
17 they never -- I mean, VARTA never gave a different
18 explanation. They should be held to the explanation they
19 provide in the PTAB proceeding.

20 THE COURT: And what is your response to the
21 argument that you should have presented this during claim
22 construction?

23 MR. WANG: We never figured VARTA would construe
24 this term inconsistent with their IPR proceeding. Their IPR
25 proceeding -- you know, from the proceeding from the PTAB's

1 explanation, it can be construed the way we construe it.

2 THE COURT: The PTAB expressly said they were not
3 construing it.

4 MR. WANG: Right. But not construed the
5 'force-fitting connection'. The PTAB explained what is
6 held together by force-fitting connection.

7 THE COURT: No. The PTAB said, We, are not
8 construing, quote, 'held together by a force-fitting
9 connection' close quote. So they were refusing to construe
10 the 'held together' part also, weren't they?

11 MR. WANG: We -- but they're clearly saying it won't
12 be held together if that condition does not present twice,
13 number one. Number two, they -- you know, VARTA disclaimed
14 the crimping, it's claimed a spring-load arrangement, it's
15 claimed adhesive connection, and we take the consistent
16 position till, you know -- even our expert report filed in the
17 May 22nd in the page 49 we -- the expert quoted the PTAB's
18 position and explained what this means. So we never feel,
19 you know, this could be a (unintelligible) from the other
20 party until recently.

21 THE COURT: All right. Well, since there is a
22 separate motion on this, which is your motion for supplemental
23 claim construction, I'll take this up and issue a written
24 order on that -- both your MIL No. 1 and your motion for
25 supplemental claim construction.

1 MR. WANG: Thank you, Your Honor.

2 THE COURT: Thank you.

3 Which takes us to Defendant's MIL No. 2. As I
4 understand, it has been withdrawn.

5 MR. HNATH: That's correct, Your Honor.

6 THE COURT: And so we're at MIL No. 3.

7 MR. HNATH: MIL No. 3 has been withdrawn based on
8 agreements reached between the parties.

9 THE COURT: All right.

10 MR. HNATH: And MIL No. 4 is a live MIL which
11 Mr. Culbertson will address.

12 THE COURT: All right.

13 MR. CULBERTSON: Your Honor, EVE's MIL No. 4 seeks
14 to exclude evidence of an alleged Chinese industry meeting
15 designed to take down VARTA's patents. And as an initial
16 matter, this evidence comes from an exhibit that may be talked
17 about later, but I can talk about it now, Plaintiff's Exhibit
18 27, which is inadmissible hearsay. It's an article written by
19 -- or a press release, it's unclear, written by an
20 organization called Sunrise Big Data. There's no connection
21 between Sunrise Big Data and EVE, and there's no connection
22 between EVE and the alleged industry meeting that's discussed.
23 And we think that if the jury is allowed to hear evidence
24 about an entire national industry meeting that was organized
25 to take down VARTA's patents and there's no association with

1 EVE, that there's a tremendous risk of confusion and undue
2 prejudice against EVE. So we have a 403 objection for that
3 reason.

4 It's unclear how this evidence would come in, given the
5 hearsay objection. I'm not sure who a sponsoring witness
6 would be. I know that EVE--excuse me--VARTA intends to have
7 Mr. Miehlisch--and I apologize if that's an incorrect
8 pronunciation--testify to the horrors of this, that he's never
9 seen anything like it in his 40- or 45-year career, but he has
10 no specific way of tying it to EVE or any -- and there's no
11 evidence that EVE attended or was associated with the meeting,
12 if it ever intended--excuse me--if it ever occurred.

13 The evidence doesn't show industry knowledge of VARTA's
14 patent portfolio by EVE. And even if it did, it would be
15 irrelevant, because if this is, as I understand the
16 contention, relevant to willfulness, they'd have to show
17 knowledge by EVE of the specific patents at issue. This
18 doesn't speak to that issue at all. And neither the Samsung
19 case that was settled nor EVE's IPRs are any evidence,
20 circumstantial or otherwise, that EVE attended this alleged
21 meeting.

22 So we ask that that evidence be excluded, Your Honor.

23 THE COURT: All right. Thank you, Mr. Culbertson.

24 MR. CULBERTSON: Thank you.

25 MR. MUELLER: Thank you, Your Honor.

1 If we could switch over.

2 I think before I address the merits, we need to take just
3 a quick step back to understand what is going to be tried at
4 this trial, and that is that EVE contends that it has no idea
5 where its products end up, and it has no knowledge that its
6 batteries end up in TWS products that come into the United
7 States.

8 So in the way in which this industry works, the battery
9 manufacturers sell their products to a contract manufacturer
10 or an OEM or ODM in China. Products that -- the earbuds are
11 made in China, then they're typically sold to another class,
12 the brand -- a brand customer who then sells its products, you
13 know, worldwide. But as we know, 35, 40 percent of these
14 products end up in the United States.

15 And so what we're talking about here is an industry
16 association meeting where Mr. Miehlisch got an invitation to
17 the meeting. It was disseminated to all the industry
18 participants, it was indiscriminately sent, and we submit
19 that it's implausible that EVE didn't get the invitation.
20 It wasn't produced to us in discovery for sure. But if
21 Mr. Miehlisch got it and he was -- and VARTA were the target of
22 this meeting, we submit that, at least inferentially, EVE
23 would have gotten it as well. And we would also submit that
24 it shows that EVE had knowledge where its products were going.
25 If we can go quickly to slide 58.

1 Here's the invitation itself that identifies EVE as -- it
2 was part of the TWS button cell patent proceedings and, you
3 know, initiated as to EVE and other manufacturers known as the
4 first war. You can see from the bottom it's talking about
5 activities targeting patents that were U.S.-based. It's
6 talking about patent wars on button cells. Well, you know,
7 that was VARTA's lawsuit against EVE's largest customer,
8 Samsung, in 2020 brought here as well as another manufacturer
9 of button cells myPower.

10 So to suggest that EVE, and if we go to the next slide as
11 well, this is not an item of evidence but this was a
12 photograph taken at the meeting, you can see EVE is one of the
13 foundational members on the bottom of the pyramid, and VARTA
14 and other manufacturers are there as well. So the argument
15 that EVE was not fully aware of this meeting and the intention
16 to take out the VARTA patent portfolio, and again to show that
17 EVE was specifically targeting its products to be -- to
18 ultimately end up through the regular commercial channels into
19 the U.S., we think certainly it should be admitted and the
20 jury can accept it if they so choose.

21 THE COURT: Why is it not hearsay?

22 MR. MUELLER: Well, it's not -- its truth is not
23 what's important here. The importance is on the impact that
24 it would have; that if EVE was being invited to a meeting in
25 which the VARTA patents were to be taken down, then that would

1 tend to show -- then whether it was true or not is not at
2 issue; the question would be whether EVE was fully
3 knowledgeable about where its batteries were going to end up.

4 And as to Mr. Miehllich, again, if we can go to the final
5 slide, he does indicate that, you know, this was something
6 that he has never seen an invitation to an industry-wide
7 conference for the purpose of destroying VARTA's U.S. patent
8 portfolio. And, you know, certainly for the issue of whether
9 EVE was knowledgeable as to where its products were going and
10 to how it was participating in this commercial -- in the
11 commercial channels of TWS products ending up into the United
12 States, we think certainly at least there is circumstantial
13 evidence that it -- that EVE had such knowledge.

14 THE COURT: You know, obviously you would agree that
15 this is a very prejudicial document, and it strikes me as
16 difficult to admit it based on an assumption that EVE received
17 it.

18 MR. MUELLER: Well, Your Honor, I would ask, if Your
19 Honor is inclined to exclude it, to at least reserve ruling
20 until we get to depose all of EVE's witnesses in the event
21 that there is someone who had knowledge of this meeting and
22 participated.

23 THE COURT: All right. Obviously you can seek to
24 revisit the ruling if you develop evidence that supports
25 reconsidering it, but I don't think at this stage of the case

1 I can say that it's not ripe for decision. And I -- unless
2 you have something stronger than I've heard to indicate that
3 EVE participated in this, I just don't see any way that it's
4 admissible.

5 MR. MUELLER: Understood, Your Honor.

6 THE COURT: All right. Well, I'm going to grant the
7 Defendant's Motion in Limine No. 4.

8 MR. MUELLER: Thank you.

9 THE COURT: Thank you, Mr. Mueller.

10 That takes us to the Defendant's MIL No. 5.

11 MR. HNATH: Yes, Your Honor. And MIL No. 5 is also
12 withdrawn based on agreements between counsel.

13 THE COURT: All right.

14 MR. HNATH: Would you like to address the *Daubert*
15 motions next?

16 THE COURT: You know, I would rather see if we can
17 get through the exhibit issues first. I am happy to hear
18 argument on the *Daubert* motion if there's time, but I want to
19 make sure we've addressed the exhibits.

20 MR. HNATH: We're at your pleasure. Thank you, Your
21 Honor.

22 THE COURT: All right. Let's take up the
23 Defendant's objections to the Plaintiff's exhibits.

24 And I have an email that was sent by Mr. Stinson last
25 night, I guess, that has buckets for those. So we can start

1 with the first one. I guess we hear first from counsel for
2 Defendant on PTX 02.

3 MR. HNATH: Yes, Your Honor.

4 And we have copies of the exhibits. Could we hand those
5 up to you so you can refer to the exhibits as we go through
6 the argument?

7 THE COURT: That's very helpful. Thank you.

8 MR. STINSON: May I approach?

9 THE COURT: Sure. Thank you, Mr. Stinson.

10 MR. HNATH: So the first objection is to PTX 2.
11 PTX 2 is a declaratory judgment complaint that was filed in
12 the Northern District of Illinois on behalf of Audio
13 Partnership and EVE Energy Company, Limited. Audio
14 Partnership has since been dismissed from the case. Our
15 objections are based, number one, on standing MIL No. 13.

16 THE COURT: Well, Mr. Hnath, let me interrupt you.
17 You're ahead on points on this one. Let me hear from the
18 other side, and I'll give you a chance to respond.

19 MR. HNATH: Okay. Thank you, Your Honor.

20 MR. MUELLER: Your Honor, we do not intend to refer
21 to litigation or satellite litigation. This is only for the
22 allegation that is made by EVE in paragraph 54 particularly
23 where, again, the issue that we're trying to the jury is
24 whether EVE has knowledge that its products are being sold in
25 the United States, and here it alleges that EVE continues to

1 offer for sale and sell EVE products, including EVE products
2 at issue, to ODM customers overseas that on information and
3 belief sell their products incorporating EVE products to
4 customers that sell the underlying products in the United
5 States.

6 So this is exactly what we say EVE had knowledge of and
7 is, therefore, inducing the infringement of an infringement
8 that is occurring in the United States. So this goes to the
9 heart of what facts are in dispute in the litigation.

10 So they told us -- they informed us last night that they
11 didn't consider this to be a judicial admission because it was
12 pled on information and belief, but this goes to the very crux
13 of what gave rise to the declaratory judgment jurisdiction
14 that they were seeking in the Northern District of Illinois.

15 And so we are not intending to argue or present evidence
16 of what happened in the Northern District of Illinois or that
17 the Northern District of Illinois case was dismissed; that's
18 not the purpose of this document; it's simply to show that EVE
19 has admitted that its products are coming into the United
20 States and, indeed, it made that allegation in this document,
21 which is -- we propose as Plaintiff's Exhibit 2.

22 THE COURT: All right. So you are only seeking
23 admission of the statement in paragraph 54?

24 MR. MUELLER: That's correct, Your Honor.

25 THE COURT: All right. Thank you, then.

1 Let me hear the response to that.

2 MR. HNATH: Yes, Your Honor.

3 So we believe that the law of judicial admissions does
4 not apply to this case, and we did bring some legal
5 authorities to VARTA's attention yesterday, so we gave them
6 a full heads up on that.

7 So judicial admissions require a formal concession, and
8 for that we would cite *Martinez versus Bally's LA*, 244 F.3d
9 474. That's a Fifth Circuit case, 2001. It's also
10 established that judicial admissions need to be deliberate,
11 clear, and unequivocal. That's *Shallow Water Equipment v.*
12 *Pontchartrain Partners*, which is 620 F.Supp.3d 495. That's
13 out of the Eastern District of Louisiana.

14 THE COURT: What about this is not unequivocal?

15 MR. MUELLER: So on information and belief. And
16 there are cases, including in this district, which says that
17 statements that are made on information and belief are not
18 judicial admissions; do not qualify as binding judicial
19 admissions.

20 THE COURT: Why isn't this just a regular admission?

21 MR. HNATH: It's made in a court. If it was made in
22 this case, we would argue it's not a binding judicial
23 admission. This is even further removed from a statement made
24 in this case; it's made in another case involving parties in
25 addition to EVE, so the information can be on behalf of not

1 only EVE but also Audio Partnership. It's a complaint that
2 was soon withdrawn after Audio Partnership settled from the
3 case.

4 So if it wouldn't be a judicial admission in this case,
5 it certainly shouldn't be deemed to be a judicial admission
6 from another case. For all the reasons and statements of --
7 on information and belief would not be judicial admissions if
8 made in the current case, we think even more so they should
9 not be deemed to be judicial admissions in another complaint.

10 THE COURT: Why isn't it just an admission under
11 Rule of Evidence 801(d)(2)?

12 MR. HNATH: Because the same would apply to any
13 judicial admission. If that were true, then any statement by
14 a party made would qualify under 801, but the law as to
15 statements made in pleadings are very well-set forth in terms
16 of judicial admissions.

17 THE COURT: All right. And what is your best case
18 on that?

19 MR. HNATH: We would like to cite three, Your Honor.
20 One would be *Corinth Investors v. Evanston*, which is 214 U.S.
21 District Lexus 118008.

22 THE COURT: Are any of them appellate decisions?

23 MR. HNATH: No, Your Honor. The first one is
24 Eastern District of Texas 2014 in which the Court stated, "A
25 statement made on information and belief in a pleading does

1 not constitute a binding judicial admission."

2 THE COURT: Well, you know, the effect of a judicial
3 admission is that you cannot contradict it, whereas an
4 ordinary admission is simply admissible but it's not binding.
5 The law that you're citing to me seems to me to be saying that
6 this doesn't qualify as a binding admission, meaning you can't
7 oppose it. But I -- do you have any law that says that
8 801(d)(2) doesn't apply in the context of statements made in
9 pleadings?

10 MR. HNATH: No, we have not found such a case, Your
11 Honor, but we would argue that where a statement is made on
12 information and belief where the information and belief can be
13 a non-party to this case--in other words, part of that
14 information and belief could be supplied by Audio
15 Partnership--that that should not be imputed to EVE, and that
16 to do so would be prejudicial. This is not a statement that
17 was made by EVE alone; it's based on information from Audio
18 Partnership. And Audio Partnership was a company that was,
19 indeed, purchasing products from the OEMs and the ODMs and the
20 contract manufacturers that Mr. Mueller had referenced. So
21 they have knowledge that EVE would not.

22 So it would be prejudicial to impute their knowledge in
23 part, which was stated -- made in a statement on information
24 and belief in another judicial proceeding to EVE in this case.

25 THE COURT: You know, 801(d)(2)(C) says that the

1 statement was made by a person whom the party authorized to
2 make a statement on the subject. EVE authorized its counsel
3 to make the statement that they're seeking to admit, did it
4 not?

5 MR. HNATH: The statement was authorized by EVE and
6 Audio Partnership.

7 THE COURT: Uh-huh.

8 MR. HNATH: And we will be in a position where we
9 need to explain to the jury that there were multiple
10 defendants -- multiple parties in the case, where the
11 information came from, and so forth and so on. I think that's
12 going to lead us to, you know, inquiries that are unnecessary,
13 and I do think it's prejudicial and we would state -- stand on
14 our opinion -- on our objection.

15 THE COURT: All right. I'm going to allow you to
16 redact this document down to just paragraph 54, but I believe
17 based on what I have before me that it is non-hearsay based on
18 801(d)(2)(C), and I'll overrule the objection to it on that
19 basis. I am not finding that it's a judicial admission and,
20 therefore, I'm not saying that EVE can't take a contrary
21 position, but I think it is admissible.

22 MR. HNATH: Thank you, Your Honor.

23 THE COURT: All right. Thank you.

24 MR. HNATH: Next is I think we resolved the issue as
25 to the duplicate sales summary. We have agreed that VARTA can

1 introduce its sales summary as its position on EVE sales. EVE
2 will produce its sales summary based on its position on EVE
3 sales, and on that basis with that clarification and
4 adjustment to the document, we would not -- we would withdraw
5 our objection to PTX 3.

6 THE COURT: All right. So I'll note the objection
7 is withdrawn in that fashion.

8 MR. HNATH: Next is a group of documents, PTX 4,
9 PTX 5, PTX 7, PTX 8, and PTX 11. Our objection to these is
10 that the documents are not linked to the accused infringement
11 at issue. We believe, therefore, they are irrelevant; that
12 their introduction would be prejudicial.

13 Let me take PTX 4, for example. And I think this will
14 get into confidential information, Your Honor, so I would
15 request that this portion of the discussion be deemed
16 confidential.

17 THE COURT: All right. We'll note your request and
18 you can seek particular relief afterwards if, in fact, there
19 is anything that needs to be protected.

20 MR. HNATH: Thank you.

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

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[REDACTED]

Varta has not made an offer for sale infringement contention. We asked them during the meet and confers if they ever made such a contention. They failed to point to one. And so that would be the basis for excluding PTX 5 and -- 4 and 5, which I understand are related documents.

PTX 7 are actually three different agreements between EVE and its contract manufacturers. There is no particular tie to the infringement issues in this case and, therefore, we would object to those documents as irrelevant.

THE COURT: And that's 7?

MR. HNATH: That's 7, yes. It appears what VARTA has done is put three different agreements with contract manufacturers into one exhibit, which is PTX 7.

THE COURT: All right.

MR. HNATH: So we would challenge the relevance of that.

PTX 8 similarly is an agreement between EVE and a purchaser of its batteries. We don't see the relevance of that document, so we would also object on relevance and 403 grounds.

[REDACTED]

[REDACTED] There is no evidence that EVE, the Defendant in this case, was in any way involved in that offer for sale. An offer for sale by EVE's

1 subsidiary would not give rise to damages as to EVE. And,
2 Your Honor, we would cite a case that was cited in our MIL
3 No. 3 actually, *Confectionary Arts v. CKP Products*, 2019 U.S.
4 District Lexus, 34735 at page 14. That's out of the District
5 of Connecticut, 2018. "In order for CI to be liable for sales
6 made by CKP, its subsidiary, plaintiff must pierce the
7 corporate veil for CI."

8 So that stands for the general proposition that EVE in
9 China is not liable for sales made by EVE North America simply
10 because EVE North America is a subsidiary of EVE China.
11 There's been no allegation, no pleading that the Court should
12 pierce the corporate veil or find EVE North America to be an
13 alter ego of EVE China.

14 THE COURT: Is this evidence that the Plaintiff is
15 offering in order to show knowledge that EVE has that its
16 batteries are ending up in the United States?

17 MR. HNATH: I would let VARTA speak to that. I
18 think they're interested mostly in the price information.

19 THE COURT: Oh.

20 MR. HNATH: [REDACTED]

21 [REDACTED] But this is an offer made by EVE North
22 America. I'm unaware of anything tying EVE China to this
23 offer for sale.

24 THE COURT: All right. And you're saying it's
25 otherwise irrelevant what the price is if it's not tied to EVE

1 China?

2 MR. HNATH: Correct. The price that EVE -- what's
3 relevant is what EVE China is offering its products for, not
4 what EVE North America is offering its products for. So if
5 that's the reason they're wanting to use it, it's irrelevant.
6 If they want to use it to show that EVE China was making an
7 offer for sale, they haven't tied it sufficiently to EVE
8 China.

9 THE COURT: All right. Thank you.

10 MR. HNATH: That's what I have for Group No. 3, Your
11 Honor. Thank you.

12 THE COURT: All right. Thank you.

13 MR. FILBIN: Thank you, Your Honor. Paul Filbin for
14 VARTA.

15 So the -- although we have a bucket, the bucket has --
16 it's almost like a couple of little buckets in one big bucket.
17 So there are several themes to these four exhibits, but Your
18 Honor just asked a question of Mr. Hnath that I think is on
19 point, is that the -- if there is a theme to this bucket, it
20 is inducement; it's EVE China's activities in America to
21 induce the infringement of others, including their -- the
22 Chinese contract manufacturers in China and also brands that
23 bring those batteries into the United States one way or the
24 other.

25 THE COURT: Well, let's start with PTX 4 and tell me

1 about your position on the relevance of it.

2 MR. FILBIN: So by way of background, EVE China
3 holds out EVE USA as EVE China's U.S. sales office. There's
4 other exhibits. [REDACTED]

5 [REDACTED]

6 [REDACTED] So they are working hand-in-glove
7 to promote and sell the accused button cell batteries, and in
8 this case particularly in the United States, but everywhere.

9 And the document you're looking at at PTX 4 is what I
10 would refer to as like a lead sheet. It's drumming up
11 business to sell the accused button cells products
12 particularly in the United States.

13 THE COURT: And were all of the documents in this
14 bucket documents that were produced in discovery by the
15 Defendant?

16 MR. FILBIN: Yes, Your Honor.

17 THE COURT: All right. So the fact that PTX 4
18 and PTX 5 are just offers, you're just saying that they are
19 relevant to show efforts to sell in the U.S.?

20 MR. FILBIN: Yes, Your Honor. It's part of the
21 active encouragement of infringement in the United States to a
22 class of people, category, i.e., contract manufacturers and/or
23 brand users.

24 THE COURT: And does your damages expert rely upon
25 any of the documents in this bucket to show the damages

1 base--in other words, the number of units sold?

2 MR. FILBIN: No, Your Honor. Mr. Metzdorff uses
3 the exhibit we just discussed a moment ago, PTX 3. That is
4 the sales information that EVE produced in several different
5 exhibits that he compiled into a summary. So he uses that
6 global sales data to compute the base -- you know, the total
7 number of units sold.

8 THE COURT: All right. Let's go to the PTX 7
9 documents, then.

10 MR. FILBIN: So -- yes, Your Honor. PTX 7 was
11 produced in the manner you see it by EVE to us, so we
12 maintained it in that format. It is a series of several --

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 THE COURT: All right.

18 MR. FILBIN: [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
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[REDACTED]

Again, we think this is completely probative and relevant to the issue of whether EVE China is inducing the infringement in the United States of VARTA's patents.

THE COURT: All right. Is there other relevance you're relying on, or is Article 1 it?

MR. FILBIN: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

THE COURT: All right. And is that representative of the relevance of the other two contracts in this exhibit?

MR. FILBIN: Yes. The others refer to -- are a

[REDACTED]

[REDACTED],

[REDACTED]

[REDACTED]

[REDACTED]

THE COURT: All right. What about Exhibit 8?

MR. FILBIN: No. 8 is more of the same as in PTX 7,

Your Honor. [REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

THE COURT: All right. And Exhibit 11?

MR. FILBIN: Exhibit 11 is another, you know, typical business record. It's a price quotation. Mr. Metzdorff uses it in particular as evidence of prices that were quoted to the outside world as opposed to internal accounting records from EVE that he found to be, in his words, nonsensical. He found this to be -- he preferenced this type of evidence as far as determining actual price offerings for EVE's accused button cell battery.

THE COURT: And what do you say to the argument that this is from EVE North America, not EVE China?

MR. FILBIN: I'll point Your Honor to page 2 of PTX 11 and note that [REDACTED]

[REDACTED] So again, it belies the notion that the two are -- that EVE China and EVE U.S. are somehow separate corporate entities. They're working together to promote and sell the accused button cell batteries.

THE COURT: All right. Thank you, Mr. Filbin.

MR. FILBIN: Thank you, Your Honor.

MR. HNATH: Your Honor, just a few comments, if I may.

THE COURT: All right.

MR. HNATH: First of all, PTX 4 and 5 are not in the

1 damages base, and I think Mr. Filbin acknowledged that.

2 Therefore, our position is that it's simply not relevant to
3 any damages theory that VARTA has set forth or infringement
4 theory that they've set forth in this case.

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] We don't believe that they've sufficiently
12 tied these agreements to anything in the United States.

13 On Exhibit 8, [REDACTED]

14 [REDACTED]

15 [REDACTED] This one seems to really be irrelevant.
16 And again, I apologize if I didn't find it. I looked through
17 it and I couldn't find it.

18 And as to No. 11, this is -- you had asked whether these
19 were documents produced by EVE China. No. 11 is not a
20 document that was produced by EVE China. As you can see from
21 the Bates number on the bottom right, it was produced by EVE
22 North America. [REDACTED]

23 [REDACTED], that doesn't mean that EVE
24 China was in any way involved in creating or sponsoring this
25 offer for sale.

1 That's all I have, unless you have any questions.

2 THE COURT: All right. Thank you.

3 I think that the Plaintiff has shown adequate relevance
4 for these documents and that the objections raised by the
5 Defendant go to their weight, not their admissibility. I'll
6 overrule the objections to PTX 4, 5, 7, 8, and 11.

7 Which takes us back to PTX 27. That's, I take it, the
8 exhibit that I was shown previously.

9 MR. HNATH: It is, Your Honor, so I believe that's
10 been resolved through our discussion of the MIL.

11 THE COURT: All right. Then the objection to PTX 27
12 is sustained.

13 And that takes us to the Plaintiff's objections.

14 MR. MUELLER: Thank you, Your Honor.

15 I think, first, we would like to talk about what we've
16 called Bucket 1, and I know that some of these were possibly
17 subject to discussion and agreement, but our Bucket 1 relates
18 to prior art that Defendants seek to introduce as evidence now
19 that they have withdrawn their invalidity defense, so that
20 would include Defense Exhibit 4, the Higuchi reference;
21 Defendant's Exhibit 3, which is Pytlik; there is a U.S. patent
22 in Brenner, that's Defendant's Exhibit 9; and then there are
23 two items relating to what's known as a zinc-air battery,
24 Defendant's Exhibit No. 24. And Defendant's Exhibit 26.

25 We believe that now that the invalidity defense has been

1 withdrawn, there need be no discussion at trial about items of
2 prior art; that they will only serve to confuse the jury and
3 they are not relevant to any issue.

4 THE COURT: Now, the bucket itself just lists 9, 24,
5 and 26. You mentioned a couple of other exhibits at the
6 outset.

7 MR. MUELLER: I did, but again -- I apologize, Your
8 Honor. It's unclear to me if those have been withdrawn by
9 Defendants or not. But the bucket relates to items of prior
10 art.

11 THE COURT: Okay. And just repeat for me, again,
12 what the other exhibit numbers were that you listed.

13 MR. MUELLER: Okay. I apologize, Your Honor. So
14 Defendant's Exhibit 1, which is Higuchi; Defendant's Exhibit
15 3, which is Pytlik; Defendant's Exhibit 9, which is Brenner;
16 Defendant's Exhibit 24, which is a zinc-air drawing; and
17 Defendant's Exhibit 26, which is another zinc-air drawing.

18 THE COURT: All right. And let me hear the response
19 to those, and I'll give you a chance to respond.

20 MR. HNATH: Just for clarification, Your Honor, so
21 Exhibit 1 has been withdrawn. Exhibit 3 also has been
22 withdrawn based on VARTA's representation that they will be
23 withdrawing any patent claims relating to the beading over
24 claim term. As you may have seen from some of the
25 correspondence, we've agreed that VARTA will be reducing the

1 number of patent claims being asserted to 15 claims by this
2 Thursday, and based on their representation that those claims
3 will not include any claims with beading over, we have agreed
4 to withdraw our Exhibit 3. So that leaves in this bucket 4,
5 24, and 26.

6 THE COURT: Is it 9, 24, and 26?

7 MR. HNATH: Yes. I'm sorry--9, 24, and 26.

8 THE COURT: All right. And what is the relevance of
9 those prior art documents now?

10 MR. HNATH: So the relevance of -- let's take first
11 DTX 9. This is a patent to a Mr. Brenner and which he
12 describes the force-fitting connection that we talked about
13 earlier today, and basically says this is his invention. If
14 VARTA makes a -- presents testimony that their inventors came
15 up with the idea of a force-fitting connection as part of the
16 invention, then we believe that this would be fair rebuttal to
17 show that, no, that wasn't their idea at all; this was an idea
18 that came from an unnamed inventor named Mr. Brenner.

19 So I don't know if they're going to make -- put on that
20 kind of testimony. I'm not sure that kind of testimony would
21 even be relevant at this point given that validity's not an
22 issue. But if they present an invention story, which
23 plaintiffs often do, about how they came up with this idea,
24 that idea, that idea, and put it all together into a button
25 cell, I think it's fair game for us to say, Well, no, you

1 didn't come up with this particular idea; someone else did;
2 you got this idea from somewhere else.

3 THE COURT: All right.

4 MR. HNATH: That's the relevance to No. 9.

5 The relevance to 24 and 26 is similar. These two
6 documents, which were produced late by VARTA, show a prior art
7 zinc-air button cell. And this zinc-air button cell had two
8 housings, just like the button cells that -- in VARTA's
9 patents. It had a gasket between the two housings, just as in
10 VARTA's patents. And if they put on evidence that, you know,
11 they came up with this idea of two housings, you know, with a
12 seal in between, then I think we should be entitled to say,
13 No, you got that idea from, you know, this zinc-air button
14 cell that was being sold by VARTA already, and these documents
15 show that zinc-air button cell.

16 THE COURT: Well, I think that the documents are not
17 admissible absent the kind of predicate you are laying which
18 would make them, in effect, impeachment documents. But I'm
19 going to sustain the objection to those, and you can approach
20 -- if you think the door has been opened by the Plaintiffs
21 improperly claiming to have originated that idea, then you can
22 approach and seek leave to use them. But I'm not going to
23 pre-admit them.

24 MR. HNATH: That's fine with us, Your Honor. And we
25 would reserve the right to at that time not only use them for

1 impeachment, but enter them into evidence. But we understand
2 your ruling.

3 THE COURT: All right.

4 MR. HNATH: Thank you.

5 THE COURT: And I guess I should go ahead and take
6 this occasion to ask Mr. Mueller, is it fair to say that you
7 do not intend to elicit testimony that your clients originated
8 the idea that the Defendant contends is displayed in these
9 exhibits?

10 MR. MUELLER: We are going to tell how our button
11 cell was invented, but we are not going to say that we
12 invented each individual component; we invented a combination
13 of components.

14 THE COURT: All right.

15 MR. MUELLER: And, you know, arranged in a
16 particular way. So we see this as, you know, an attempt to
17 backdoor an invalidity case, which would be entirely improper.

18 THE COURT: Well, hopefully your side will not
19 approach that door so there won't be a cause to argue whether
20 it's been opened, but --

21 MR. MUELLER: Understood, Your Honor.

22 THE COURT: All right.

23 MR. MUELLER: Your Honor, I believe I have
24 responsibility for Bucket 2 as well, which is Defendant's
25 Exhibit 2, and that is a drawing. And we disparage it, in

1 quotes, as -- it's a cartoon-type of drawing that --

2 MR. HNATH: I think he's mistaken in terms of what
3 -- may we confer one second, Your Honor?

4 THE COURT: Sure.

5 MR. HNATH: I don't want him to go too far.

6 MR. MUELLER: You withdrew it? Thank you. Again, I
7 should have stayed up later last night, I guess.

8 So I think EVE's patent list is the next item in the
9 list, and we talked about that earlier today where I think
10 the resolution of the motion in limine resolves this issue as
11 well.

12 THE COURT: I think that DTX 6 is either withdrawn
13 or the objection is sustained. I'm not sure which -- do I
14 need to sustain that objection or is that exhibit withdrawn?

15 MR. HNATH: It's withdrawn, Your Honor, based on the
16 discussion about the MIL earlier.

17 THE COURT: All right.

18 MR. MUELLER: Thank you, Your Honor.

19 Mr. Filbin will be addressing the next bucket.

20 THE COURT: If this -- let me interrupt a minute to
21 say we've only got three exhibits left, so we can go a little
22 long and go through those, but are there other motions that
23 the parties want to orally argue, in which case we can break
24 for lunch and come back?

25 MR. HNATH: May we confer, Your Honor, just one

1 second?

2 THE COURT: Sure.

3 (Pause in proceedings.)

4 MR. HNATH: Your Honor, may I?

5 THE COURT: Yes.

6 MR. HNATH: Okay. So other than the remaining
7 exhibit issues, there is VARTA's motion to exclude certain
8 opinions of Mr. Juzkow and EVE's motion to exclude certain
9 opinions of Doctor Horn. We would prefer, since we're all
10 here together, to go ahead and argue those motions even if we
11 have to come back after lunch, with your indulgence. That
12 would be our preference.

13 THE COURT: All right. And I assume that's
14 acceptable to the Plaintiff as well.

15 MR. HARTMANN: Yes, we would agree.

16 THE COURT: All right. Well, then we'll go ahead
17 and recess now until 1:15. Thank you.

18 (Lunch recess.)

19 THE COURT: Good afternoon. Please be seated.

20 We are ready to resume with the objections to Defendant's
21 exhibit in Bucket 3, I believe.

22 MR. MUELLER: Thank you, Your Honor. Wes Mueller on
23 behalf of the Plaintiff VARTA.

24 The Plaintiff, in the interest of expediency, is
25 withdrawing its objections to Bucket 3, which I believe is

1 Defendant's Exhibit 16-C, as well as Bucket 4, which are
2 Defendant's Exhibits 25-C and 27-C.

3 THE COURT: All right.

4 MR. MUELLER: Which I believe takes us to the end of
5 Defendant's exhibits, with Bucket 5 being the IPR decisions,
6 which presumably will rise and fall with Your Honor's decision
7 regarding the MIL.

8 THE COURT: All right. I understand that and I'll
9 get something written on that.

10 Then whichever is the first of the motions that counsel
11 want to argue, we can hear from the movant.

12 MR. WITTMAN: Good afternoon, Your Honor.

13 The next motion is VARTA's motion to strike and exclude
14 the opinions of Marc Juzkow, or certain parts of his opinion.

15 Just as an initial matter, we had originally briefed
16 several issues in our motion to strike and exclude Mr. Juzkow,
17 and we have dropped most of the issues except for one. So
18 we've dropped what was Section 3(b) in our brief which related
19 to an Ultralife cell that's no longer at issue, and also
20 section 3(c)(1) which related to Mr. Juzkow's analysis of an
21 insulator.

22 What remains at issue is what we contend to be
23 Mr. Juzkow's improper claim construction of the term 'spot
24 welded connections and/or linear welded connections' in his
25 report, and that is specifically at paragraphs 277 through 292

1 of Mr. Juzkow's rebuttal expert report on the infringement
2 issue. And the precise issue is we believe that it is clear
3 from Mr. Juzkow's expert report as well as his testimony that
4 he is taking a term which the parties agree was subject to
5 plain and ordinary meaning and he is reading in a preferred
6 embodiment from the patent specification. And specifically he
7 is reading in a limitation that the weld must be made with
8 laser welding, and also that the weld bead pass through the
9 housing.

10 And if I could just start, I've put up the claim at
11 issue, which is claim 1 from the '904 Patent, and I've put up
12 the claim language and underlined the particular claim term
13 that is at issue, which, again, is the 'one or more
14 spot-welded connections and/or linear welded connections'.
15 And there is no mention in claim 1 of the '904 Patent of laser
16 welding or a weld bead passing through the housing.

17 As some background, and we initially believe that there
18 is a waiver and what we believe to be an attempt through EVE's
19 expert to construe a term that EVE agreed was subject to plain
20 and ordinary meaning. And I've just summarized here EVE did
21 initially identify the term for a construction, and EVE's
22 original proposed constructions indicated that the term was
23 limited to a laser weld.

24 After VARTA submitted its claim construction brief, EVE
25 withdrew its request to construe the term, as reflected in the

1 graphic on the bottom shows an excerpt from an email that was
2 provided from counsel for EVE to counsel for VARTA indicating
3 that they were withdrawing their request to construe the term,
4 and, further, that they agreed to VARTA's proposal of plain
5 and ordinary meaning.

6 If I could turn first to Mr. Juzkow's testimony during
7 the deposition, he acknowledged multiple instances in his
8 deposition that a person of skill in the art would understand
9 that a type of welding called 'resistance welding' or
10 'resistive welding' is a well-known spot welding process.
11 And following his deposition--or, excuse me--in his expert
12 report, if we look at his analysis, for example, in the
13 paragraph shown on slide 23, it is clear that he is relying on
14 examples from the specification to narrow the term beyond its
15 plain and ordinary meaning.

16 And, for example, in paragraph 280, he discusses
17 preferred examples from the patent specification. In
18 paragraph 281, he indicates that a POSITA would understand
19 the term 'by one or more spot-welded connections and/or linear
20 welded connections' in claim 1 to mean that there are weld
21 beads and/or weld spots that pass through the housing.

22 In paragraph 285, in his analysis of the EVE cell, he
23 concludes that the claim limitation relating to weld spots is
24 not met because it is not of the type that is formed from
25 laser irradiation. And I'm looking specifically at paragraph

1 285 where he is concluding that the EVE cell is resistance
2 welding, which he acknowledged during his deposition is a form
3 of spot welding, and concluding that it does not meet the
4 claim language, again, because it is not laser welding.

5 And we know that he is importing limitations from the
6 patent specification first because he tells us he is during
7 his deposition. He was asked if he's limiting the claim to
8 an example from the patent specification, and he acknowledges
9 that he is.

10 Further, if we actually look at the specification from
11 the patent, we see on the left some excerpts that just talk
12 about spot-like and/or linear welded connections without
13 imposing any further limitation on those types of weld, like,
14 you know, a laser or weld beads passing through the housing.
15 They are just discussed generically on the left.

16 On the right we see the part that Mr. Juzkow is relying
17 on, which is the part of the specification that talks about
18 the, you know, 'preferably done by the schematically
19 represented laser 114'. And again, that's on the graphic on
20 the right, the first highlighted part.

21 And then the second part from that same paragraph where
22 it talks about weld beads which pass fully through the housing
23 of the button cell, that is also a limitation that he is
24 importing into the claim even though there is no support for
25 it in the claim language itself.

1 And we believe that this clearly crosses the line of an
2 expert merely applying the plain and ordinary meaning to the
3 patent claim language and imports the limitations into the
4 claim which we believe is an improper claim construction by
5 the expert. We believe that it would violate the Court MIL
6 No. 18 which precludes the parties from doing exactly what
7 Mr. Juzkow does for purposes of infringement or
8 non-infringement that is comparing the accused product to
9 preferred embodiments in the patent specification.

10 And in their response, the Defendants appear to take the
11 position that this is not -- he's not construing the claim,
12 but it is clear from his analysis that that is exactly what
13 Mr. Juzkow is doing; he is importing the preferred
14 embodiments.

15 And unless Your Honor has any questions, that's all I
16 have.

17 THE COURT: All right. Thank you, Mr. Wittman.

18 MR. WITTMAN: Thank you.

19 MR. CURTIN: Can you go to slide 10, please, Geoff?

20 Good afternoon, Your Honor. You know, I'll start by
21 saying I think it's -- to understand and rule on this motion,
22 it's important to actually give a close read to Mr. Juzkow's
23 report. The sections that VARTA seeks to exclude is
24 paragraphs 277 to 292 and 301 to 306.

25 We argue the Court should deny VARTA's motion and permit

1 Mr. Juzkow's testimony because the -- we believe VARTA is
2 mischaracterizing the dispute here and what this is really
3 about.

4 The infringement dispute -- and Mr. Juzkow's
5 non-infringement opinion is not about the definition of weld
6 or connections; it's not about what spot welding is or what
7 linear welding is. EVE's not seeking a new claim
8 construction, obviously, and we don't believe the testimony
9 contradicts the Court's prior claim construction or violates
10 MIL 18; rather, Mr. Juzkow's non-infringement argument is
11 based on the meaning of 'directly connected' in light of the
12 intrinsic evidence. That's another part of that claim
13 limitation that hasn't been so highlighted.

14 Next slide, please.

15 If you look -- it's element D of claim 1 of the '904
16 Patent, also carries through to a couple of other claims,
17 "wherein a first of the current collectors provided in the
18 form of the metal foiler mesh includes an uncoated section
19 that is not coated with active electrode material." Now, this
20 -- "the uncoated section being directly connected by one or
21 more spot-welded connections and/or linear welded connections
22 to a first of the housing components." You know, this -- I
23 mean, we highlighted a different portion of this limitation
24 than VARTA did on their slide, but we think that is the key.

25 THE COURT: Well, does Mr. Juzkow contend that it

1 must be a laser weld?

2 MR. CURTIN: I don't believe so, Your Honor. We
3 don't read it that way.

4 THE COURT: All right.

5 MR. CURTIN: I can't speak to everything he said in
6 his deposition, but --

7 THE COURT: Well, the -- what I heard from the
8 Plaintiff was that they're objecting to his conclusion that
9 the claim requires that it be a laser weld and that the weld
10 be through the housing wall.

11 MR. CURTIN: Well, Your Honor, I think it is fair
12 to say that Mr. Juzkow does conclude that the weld must go
13 through the housing in order to directly connect the current
14 collector to the housing component, or must go through, but I
15 don't believe there's anywhere in his report he says that that
16 must be done by lasers. He talks about -- he certainly talks
17 about an embodiment in the specification that talk about what
18 this would mean to a person of ordinary skill in the art in
19 terms of how you make a direct connection, and I can't dispute
20 the language from his report --

21 THE COURT: Well, look at --

22 MR. CURTIN: -- that VARTA put up there.

23 THE COURT: I'm sorry. Look at paragraphs 285 and
24 287. Those are the paragraphs that the Plaintiff contends
25 contain his opinion that it has to be by laser.

1 MR. CURTIN: Okay. And Your Honor, but I think when
2 I saw that up there, my conclusion was -- my initial -- my
3 immediate reaction was that that's not where his
4 non-infringement conclusion is. His non-infringement
5 conclusion is in paragraph 283, we argue, where -- which
6 says --

7 Next slide, Geoff, please.

8 283, he starts by present extending entire limitation.

9 Then next slide, please.

10 "Therefore, the EVE accused products do not have weld
11 beads and/or weld spots that pass through the
12 housing"--clearly says it has to pass through the
13 housing--"which means the uncoated section in the EVE accused
14 products does not connect to the housing by one or more spot
15 welded connections and/or linear welded connections." It's
16 about connection; it's about the direct connection, we
17 believe. And in order for the weld to be what is connecting
18 it, what's directly connecting it, it does have to pass
19 through the housing.

20 Now, let's -- now, in -- with regard to 283 and 285, Your
21 Honor, it's important to note -- well, on 285 and 287, Your
22 Honor, I apologize for not having this in the presentation for
23 you, but Mr. Juzkow, that's the part of his report where he's
24 critiquing the evidence presented by Doctor Horn to argue that
25 this infringement has -- that this limitation has been met.

1 There's an image directly above 285, and he says -- does say
2 that's not a weld spot because that's the stamp created by the
3 welding head, you know, on the output conductor.

4 287, I'll just say he talks about how VARTA's doing it.
5 He doesn't say -- nothing in 287 says in order to infringe
6 this claim you have to do it with a laser, that you have to
7 laser weld.

8 THE COURT: All right. Well, I'll just have to look
9 at the report and the briefing. I think I know how to
10 recognize whether the expert is engaging in claim
11 construction, and I understand that you would contend he's not
12 and they contend he is, and until I have a chance to, as you
13 recommend, review the report, at least that section of the
14 report in its entirety, I won't know.

15 MR. CURTIN: Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Curtin.

17 Anything else on this argument, Mr. Wittman?

18 MR. WITTMAN: Yes, just very briefly.

19 There was a portion of the claim that Mr. Curtin
20 highlighted that indicated that the expert was analyzing.
21 I would simply note that that term was not asked to be
22 construed, and I think even if that were the case--and I don't
23 believe that's what Mr. Juzkow's report reflects--would not
24 support the analysis that he is undertaking.

25 We also disagree that a weld bead or a spot has to pass

1 all the way through the housing to make a direct connection.
2 If two pieces of metal are welded together, they have a direct
3 connection.

4 So then if we could just maybe have the presentation back
5 really quick.

6 I think, again, paragraphs 281, he is specifically
7 talking about the term 'by one or more spot-welded connections
8 and/or linear welded connections'; he is not talking about a
9 different claim term when he is talking about the weld beads
10 or weld spots passing through the housing. And again, in
11 paragraph 285, he is -- the first sentence he talks about the
12 alleged welded spot. So he is, again, talking about the
13 claimed weld spots when he is introducing the concept of
14 requiring laser irradiation. And that's in paragraph 285.

15 That's all I have, Your Honor.

16 THE COURT: All right. And Mr. Wittman, just so
17 I'll understand, you agree that the only live part of your
18 motion is part 3(c)(2)?

19 MR. WITTMAN: That's correct, Your Honor.

20 THE COURT: All right. I will confine myself to
21 that part and take it up. Thank you.

22 MR. WITTMAN: Thank you.

23 THE COURT: And so the last motion is the
24 Defendant's motion to exclude certain opinions of Doctor Horn.

25 MR. CURTIN: Slide 15, please, Geoff.

1 Your Honor, in this motion EVE moves to exclude a portion
2 of Doctor Horn's report that addresses or offers his opinions
3 on whether or not EVE reasonably relied on its -- on the
4 opinions of counsel it received. Part of its advice of
5 counsel defense to willfulness. And he opines that the
6 reliance was unreasonable, and the section is paragraphs 617
7 through 634. We maintain those opinions are inadmissible
8 under Federal Rule 702, 704, and 403 and should be excluded
9 for the following reasons really.

10 First of all, the question of reasonableness is a legal
11 concept, and reasonable reliance on opinions of counsel, in
12 particular, is a legal concept. And Doctor Horn, you know,
13 admitted at his deposition--I don't think anyone
14 disputes--that he's not a lawyer and has no particular legal
15 expertise; therefore, we believe he's lacking the specialized
16 knowledge required to assist the trier of fact as required by
17 702(a).

18 Also using unreliable principles and methods applied to
19 this analysis because he's focusing on his technical
20 critiques, his technical analysis, his technical disagreements
21 with the opinions of counsel on various bases, and that's the
22 wrong standard for judging the competence of an opinion of
23 counsel.

24 As the Court's likely aware, and as Mr. Hnath mentioned
25 earlier in another context, opinions of counsel are judged

1 primarily on thoroughness, not completeness, whether or not a
2 business person who doesn't have to be a lawyer or a technical
3 expert would be justified in relying on them.

4 And Doctor Horn expresses legal conclusions and it would
5 be -- and the 403 argument is that it would be inappropriate
6 to allow his, you know, Ph.D. technical credentials to bolster
7 VARTA's legal positions when it's not -- those aren't areas on
8 which he should be opining.

9 Next slide, please.

10 In its briefing -- in its opposition, Your Honor, we
11 think it's telling that VARTA cites no cases in which a court
12 allowed a technical expert to opine on reasonable reliance,
13 and we believe this should not be the first. As I mentioned
14 before, business decision-makers need not be technical
15 experts, and reasonableness is a legal concept. We do have
16 two district court cases here, *Briley* and *Heatherly*, in which
17 -- well, the first of which excluded an engineer's testimony
18 about reasonableness, whether or not the defendant took
19 reasonable step, and I think that was in a retail store
20 safety-type of case; it wasn't about advice of counsel. And
21 in the *Heatherly* case they excluded the engineer's legal
22 conclusions.

23 And next slide, please.

24 And Doctor Horn engaged -- made a number of improper
25 legal conclusions. At paragraph 617, you know, he was given

1 the task of reviewing the opinions of counsel produced by EVE
2 and offer his opinion as to whether a business person would
3 have reasonably relied on them. And he expresses the opinion
4 it would have been unreasonable for EVE to rely on those
5 opinions that the VARTA patents were invalid or not infringed.

6 Then going on to paragraph 628, "The above technical
7 deficiencies aside"--it's after he critiques the -- he offers
8 some technical critiques and he talks about the -- some IPR
9 denials--"the decisions from the Patent Office would have
10 caused any battery manufacturer to seriously question the
11 reasonableness of relying on the previous opinions of
12 unpatentability. A reasonable battery manufacturer would have
13 obtained further opinions in light of those decisions." And I
14 believe there's no evidence of record and we maintain that
15 Doctor Horn's not only not qualified to talk -- you know,
16 express legal conclusions, but he's not a battery manufacturer
17 and we don't believe he has the experience to talk about what
18 a reasonable battery manufacturer would have done. There's a
19 legal aspect to that as well.

20 And next slide, Geoff.

21 Again, we have three statements--the Rimon opinion would
22 not have been reasonably relied upon by a manufacturer, [REDACTED]
23 [REDACTED], and in my
24 opinion, a battery manufacturer would not reasonably rely on
25 opinions and analysis provided by a Chinese law firm with

1 respect to infringement and validity of U.S. patents. Again,
2 those are flat out legal conclusions.

3 And while rule 704(a) -- they do eliminate the ultimate
4 opinion rule, it's still clear, including from the advisory
5 committee notes, that that change in the rule is not intended
6 to allow experts to offer legal conclusions.

7 Now, and aside from his legal conclusions, if you look at
8 the rest of the section we're talking about, there are --
9 since everyone's used the term 'buckets' today, there are
10 essentially three buckets of opinions that Doctor Horn
11 provides, all of which -- well, all of which really VARTA
12 could develop from other sources. He offers technical
13 critiques that are only tangentially relevant to the core
14 issue of the competence of the opinion of counsel and factual
15 evidence that VARTA can develop through cross examination of
16 EVE witnesses.

17 He offers testimony about the contents of the opinion
18 letters, what's in them--contents, format, things of that
19 nature. And that's the first line. He talks about some PTAB
20 denials, the institution denials which were discussed earlier
21 today. And he says that those decisions by the Patent Trial
22 and Appeal Board made -- makes EVE's continued reliance on
23 those opinions unreasonable.

24 That's a perfectly fine argument for counsel to make, but
25 Doctor Horn has no business making that argument. Counsel

1 can -- I mean, if the Court decides that the IPRs can -- we
2 can have testimony on those, you know, after you rule on the
3 MIL, you know, the Court could take judicial notice of the --
4 for example. That would be another way and counsel can argue
5 about them. Counsel can cross examine an EVE fact witness who
6 will be testifying about reliance on advice of counsel to draw
7 out those issues and present those issues to the jury. And
8 Doctor Horn also presents technical critiques based on his own
9 analysis.

10 Next slide, Geoff.

11 Okay. And just to go quickly over a point we've already
12 discussed, Doctor Horn's technical critiques are tangential to
13 the core issue. Legal competence of an opinion of counsel is
14 not the same as technical correctness. And this goes back to
15 some earlier cases, but it's still -- the rule's still the
16 same. Thoroughness, not correctness, is the proper focus,
17 because the question only arises where counsel was wrong, and
18 the Federal Circuit decision by *Ortho Pharmaceuticals versus*
19 *Smith* is one of the key early decisions there.

20 And because of this -- and the *Simmons* case is worth
21 citing. You know, it's not exactly on point, but the point
22 is that the business decision-maker is suspected to be a
23 layperson. They are not expected to be a technical expert,
24 and they are not expected to be able to go behind and check
25 the legal competence of their opinion of counsel.

1 And the point is that, you know, in evaluating whether
2 EVE reasonably relied on the opinions of counsel, you have to
3 look at that from the perspective of the business
4 decision-maker. And when you're judging whether or not the
5 opinion of counsel was competent so that the decision-maker
6 could reasonably rely on it, that issue is determined
7 basically by looking at the opinion on its face--thoroughness,
8 the type of analysis, things of that nature. It's not based
9 on whether it says a particular piece of prior art has a
10 beaded-over cover or something like that.

11 Finally last slide, Geoff.

12 THE COURT: I take it, Mr. Curtin, that the
13 Defendant does not intend to call any of the counsel.

14 MR. CURTIN: That's true, Your Honor, yes.

15 THE COURT: Who would be the business decision-maker
16 that you're going to present?

17 MR. CURTIN: Gary?

18 In terms of trial witnesses, Your Honor, I'm not
19 positive, but that's -- there's still some travel issues,
20 as Mr. Hnath mentioned, that --

21 THE COURT: But you are going to present a witness
22 to testify about reliance upon the opinion of counsel?

23 MR. CURTIN: Your Honor, I believe that is our
24 intention. In order to assert the defense that EVE acted in
25 reliance of counsel, we have to have some testimony of a

1 representative of the company to say it.

2 THE COURT: I would expect that.

3 All right. Do you know whether the Plaintiff has
4 obtained a deposition -- I notice that they have the counsel
5 listed on their witness list as may call live or by
6 deposition. Have the counsel been deposed?

7 MR. CURTIN: I believe two of the counsel have
8 been deposed. Mr. Jason Xu of the Rimon law firm and --

9 THE COURT: Thomas Bejin.

10 MR. CURTIN: -- Mr. Bejin. They were both deposed.

11 THE COURT: So these things that are in Doctor
12 Horn's report on this section, they were -- counsel were asked
13 about those?

14 MR. CURTIN: I would -- about the technical
15 critiques? The issues? I would expect so, Your Honor. I
16 was not the one -- I was not at those depositions.

17 THE COURT: All right. Thank you, Mr. Curtin.

18 MR. CURTIN: Thank you.

19 MR. MUELLER: Thank you, Your Honor.

20 If we could have slide 48.

21 So the suggestion here is that we just take the opinion
22 at face value, and if it looks like it's workable then we just
23 accept it. But the law, as we've shown from the *Golden Blount*
24 case, says that once the privilege has been waived, that the
25 patentee is free to introduce evidence to challenge the

1 competence of the opinion, and we submit that is what we are
2 doing here.

3 If we can go back to slide 40.

4 Doctor Horn is an imminently qualified technical expert.
5 His opinions go directly to the technical deficiencies in the
6 legal opinions. He is -- that is well within his area of
7 expertise to consider the prior art that is being discussed.
8 And his conclusions on reasonableness, which I believe is what
9 is the real objection here, they flow directly from the
10 technical deficiencies that he finds in the opinions.

11 THE COURT: What is his background in dealing with
12 patent claims?

13 MR. MUELLER: Well, he has had --

14 And if we can go to slide 46.

15 He did work in the area of patent clearance at one of the
16 companies that he worked at, at Energizer Eveready Company,
17 but -- so it is not necessarily a question of patent clearance
18 here, but certainly from the standpoint of looking at whether
19 the prior art is being faithfully applied to the claims and
20 whether the opinions, therefore, from a technical standpoint
21 show that the claims are what the opinions ultimately conclude
22 is something that is well within his area of expertise.

23 And perhaps we can look at some of the examples of what
24 he's saying.

25 Slide 47.

1 You know, [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED], and he
5 explains why the opinions are deficient, because he's -- and
6 he's talking about very specific aspects or items in the prior
7 art references that are being discussed by the lawyers
8 rendering the advice. He talks about -- and that's
9 what -- that's consistent with everything that is underlying
10 his conclusions that the opinions are technically deficient.

11 And so we would submit that based on his experience and
12 knowledge in the area of batteries and his understanding of
13 battery technologies, he can read the references as well as
14 the advice from the standpoint of a person skilled in the art
15 and then apply that to how a reasonable business person would
16 have reacted and whether, for example, a reasonable business
17 person would have asked questions about, you know, is this
18 opinion correct, or if there were subsequent events. And he
19 talks about that in some detail, too.

20 We've gone over the IPR decisions, which we would submit
21 call into question and are directly at odds with the opinions
22 that were rendered by both the Rimon law firm and the Bejin
23 law firm. And so he looks at what was said later on in the
24 IPR decisions, notes that it's contrary to the opinions that
25 were previously issued, and indicates that a reasonable

1 business person would have asked whether the opinions needed
2 to be updated or would have at least -- it would have at least
3 called into question whether the person would have gone on in
4 their activities that they were now pursuing with respect to
5 the alleged infringement of the VARTA patents.

6 THE COURT: What is his background as a reasonable
7 business person?

8 MR. MUELLER: Well, he has vast experience both as a
9 consultant and in the industry in various capacities. It's
10 set forth in his report.

11 THE COURT: Do any of those capacities involve
12 making decisions about whether patents are valid or apply to
13 certain manufacturing processes?

14 MR. MUELLER: Well, he knows what the patent process
15 is about. He's gotten several patents. And again, he was
16 responsible for clearing products in one of his job capacities
17 with respect to patents that existed. So he does have at
18 least some experience in that area.

19 And again, he is not -- to be clear, he is not looking at
20 these opinions in determining whether the law of obviousness
21 was applied correctly, whether the prior art is anticipating;
22 he is looking at them only from the standpoint of does the
23 reference teach what the attorney is advising that it teaches,
24 and when the attorney is making the supposed combination of
25 the references or modification to the references, does that

1 hold up from a technical standpoint.

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 THE COURT: If you look at his paragraph 624, in the
8 middle of the paragraph he states, "It is my understanding
9 that a finding of obviousness of a patent claim requires some
10 motivation or reason to combine or modify references which is
11 plainly lacking throughout this opinion, including with
12 respect to this output conductor requirement."

13 That -- where does he derive his understanding of the
14 requirements of a finding of obviousness of a patent claim?

15 MR. MUELLER: So he derives that understanding based
16 on his work on this matter. He does not have an independent
17 understanding of the legal aspects of what renders a claim
18 obvious.

19 THE COURT: So why is he expressing an opinion on
20 something that he has no background or training on?

21 MR. MUELLER: Because he can certainly understand
22 with -- armed with the legal requirements, he can certainly
23 make the legal connection as to whether the requirements are
24 satisfied.

25 Leading up to this motion, we had talked about if the

1 issue really is that Defendants object to him opining on the
2 legal consequences or the legal requirements in the opinions,
3 we would limit his testimony to talking about the technical
4 aspects of the opinions only. We weren't able to reach
5 agreement on that, but that is one compromise that we would be
6 willing to pursue here, Your Honor.

7 THE COURT: Well, that would certainly resolve some
8 of my concerns about it. I agree that he appears to be
9 imminently qualified about battery technology, but this
10 opining as to whether or not it was reasonable for a business
11 person to rely upon this opinion of counsel seems to be
12 outside that area of competence.

13 Let me hear from counsel for Defendant why he shouldn't
14 be allowed to express opinions about the technology that he
15 refers to in this section.

16 MR. CURTIN: Well, Your Honor, thank you.

17 As Your Honor noted, we're not challenging Doctor Horn's
18 technical credentials. I mean, he certainly has the
19 qualifications to opine on the technology in this case. But
20 if you listen -- listening to the argument counsel was making
21 and the critiques counsel was making --

22 I think it's around slide 23, Geoff.

23 -- every one of those critiques of the opinions, as I
24 said, they are arguments that counsel can make. If Doctor
25 Horn is sitting up on the witness stand in front of the jury

1 and he's handed an opinion of counsel that EVE is relying on
2 as an exhibit and he goes through that opinion of counsel and
3 picks it apart on a technical basis, you know, naturally
4 that --

5 Oh, I'm sorry. That's not it, Geoff. No. That's -- go
6 up one, please. Up one. Never mind. Just take them down.

7 The -- you know, of course it would have a prejudicial
8 effect, but it we believe it would have an unduly prejudicial
9 effect because it would lend the weight of Doctor Horn's
10 technical expertise and credentials to support VARTA's legal
11 positions when, yes, there's a totality of the circumstances
12 analysis involved here, but the bottom line is that the
13 competence of an opinion of counsel is evaluated primarily on
14 its face. It's not the same as technical correctness,
15 because, of course, this only becomes an issue -- I mean, the
16 advice of counsel defense to willful infringement only really
17 becomes an issue when a trier of fact is decided, more or
18 less, that the opinion is wrong, that you have a valid -- a
19 claim has been infringed and not proven valid.

20 So technical correctness isn't the standard. And that
21 gets into the prejudice that EVE can suffer if the jury starts
22 to think that technical correctness is what it's all about.
23 And Doctor Horn is a distinguished expert and presumably the
24 jury likes him and then, you know, it just -- it's -- that's
25 the 403 part of the analysis.

1 THE COURT: Isn't it a matter of degree? I mean, if
2 there is no technical accuracy in the opinion of counsel, then
3 surely that's something that the Plaintiff can point out.

4 MR. CURTIN: Surely, Your Honor; absolutely. And I
5 think Plaintiff can point that out through cross examination,
6 but --

7 THE COURT: How are they going to do that if you
8 don't call the counsel?

9 MR. CURTIN: Well, if counsel -- if the counsel was
10 being deposed, they could cross examine the counsel. They
11 could also cross examine, presumably, the EVE fact witness.

12 THE COURT: And I expect that EVE's fact witness
13 will say, Well, that's what the lawyer said and we paid him
14 because he was an expert and this is what he told us.

15 MR. CURTIN: Yes.

16 THE COURT: So I don't think they should be limited
17 to cross examining your fact witness about the accuracy of the
18 opinion letter.

19 But anyway, I do understand that position, and I'll look
20 further at this, but while I do think that some of these
21 opinions go beyond Doctor Horn's area of competence, I think
22 that the Plaintiff is entitled to offer his technical opinions
23 about the correctness of the factual statements in the opinion
24 letters. But anyway.

25 MR. CURTIN: Thank you, Your Honor.

1 THE COURT: Thank you.

2 Are there any other motions that counsel want to offer
3 oral argument on?

4 MR. HNATH: None from EVE, Your Honor. Thank you.

5 THE COURT: All right. Thank you.

6 MR. HARTMANN: None from VARTA as well, Your Honor.
7 Thank you very much.

8 THE COURT: Well, one thing we need to accomplish is
9 to get a final exhibit list from each side. What I would ask
10 is that each side draw up a list of what they think is all of
11 their pre-admitted exhibits, offer it to the other side, and
12 then it can be -- after you've met and conferred, it can be
13 filed with the Court. If there are disagreements that cannot
14 be resolved, then we need you to notify the Court. You can do
15 that through a joint notice, and we will gather back together
16 before the appointed hour and resolve those disputes if there
17 are any.

18 So my first question would be here we are on Monday. Can
19 you by the end of this week exchange those lists, and then by
20 the end of the following week you can file them with the Court
21 along with a joint notice on any objections?

22 MR. STINSON: Yes, Your Honor. Plaintiff does not
23 have a problem with that.

24 THE COURT: All right.

25 MR. CULBERTSON: Yes, Your Honor.

1 THE COURT: Good.

2 Another thing is if there are any depositions that the
3 Plaintiff would intend to offer on the first day -- in other
4 words, that would be after the jury has been selected and
5 impaneled, there will be half a day typically of evidence.
6 If you have a deposition that is going to be used that day,
7 we need to make sure that either there are no objections to
8 the portions of it that are going to be offered, or if there
9 are objections, we need to gather back together and get those
10 resolved because there won't be time to take them up in the
11 ordinary course of what we've described.

12 So that's the question to Plaintiff. At this point,
13 can you proceed your first day without depositions? Or if
14 not, let's figure out how to address them.

15 MR. HARTMANN: My best guess is, Your Honor, that
16 the first day we probably will not get to the depositions,
17 but I'm guessing that right now because, as Your Honor will
18 appreciate we're reshaping the presentations now taking
19 validity out of the case, so that will accelerate things.
20 So I cannot promise here today that we might not get to a
21 deposition about 5:00 or 4:00 that evening, that afternoon.

22 THE COURT: Well, how about if we say by the Friday
23 before, which would be I guess September the 4th, if I'm --
24 no, the 11th is a Monday. The 7th -- I guess that would be
25 August 31st maybe, or September the 1st. I should look at a

1 calendar. Can you have made that determination by Friday,
2 September the 1st, so that if --

3 MR. HARTMANN: Sure.

4 THE COURT: -- you are going to use a deposition and
5 you have not resolved the objections with the other side, you
6 can notify the Court and we'll have time in that week before
7 trial to resolve those objections?

8 MR. HARTMANN: We'll do that. I think the safest
9 thing is perhaps to assume that we will call some of the
10 witnesses by deposition, and so we are now already in the
11 process of preparing the video excerpts to show. So yes,
12 we'll have those prepared and furnished to counsel for
13 Defendant to determine whether there are any issues that
14 need to be raised.

15 THE COURT: All right. And I should also let you
16 know that over the break I confirmed that there is at least
17 a likelihood that the jury selection will be on Friday,
18 September the 8th. Now, I don't think a final decision has
19 been made on that, but in any event, you should plan for that
20 possibility.

21 MR. HARTMANN: Your Honor, if I may ask the question
22 whether lead counsel -- whether I need to be present for that,
23 or if that is a local rule that is required. I would plan to
24 have, you know, Mr. Stinson head up the jury selection effort.

25 THE COURT: If you're not --

1 MR. HARTMANN: My witnesses are flying in from
2 Germany. You know, that Thursday, Friday, they are all
3 gathering in Chicago, and so there is some logistical concerns
4 I have, but...

5 THE COURT: Well, if you determine that you are not
6 able to be there on that Friday and if, in fact, you get
7 notice the jury selection is to be scheduled then, I'd ask you
8 to get with Mr. Stinson and advise the Court. I don't
9 anticipate a problem with that, but --

10 MR. HARTMANN: Okay. Thank you.

11 THE COURT: -- we can take it up.

12 MR. HNATH: Your Honor, may I ask, if the jury is
13 going to be selected on Friday, does that mean we would get
14 the juror questionnaires sooner than Thursday?

15 THE COURT: I think that if the jury selection is
16 moved to Friday, we'll move the Thursday dates to Wednesday.
17 That would include when you'll get the questionnaires, but it
18 will also include when the jury notebooks would be due.

19 MR. HNATH: Okay. Thank you, Your Honor.

20 THE COURT: All right. And I will make sure you get
21 that word as soon as a decision is made on that. But there
22 are, as I mentioned, several other cases that are on this same
23 docket and we're coordinating with those as well.

24 Let me see. I'm sure I'll think of something else that
25 we need to take up. If so, we'll notify you promptly.

1 Is there anything else that either side wants to take up
2 now?

3 MR. STINSON: No, Your Honor.

4 THE COURT: All right.

5 MR. HNATH: Nothing from EVE. Thank you for hearing
6 us today, Your Honor.

7 THE COURT: All right. Then thank you all.

8 And we are adjourned.

9 (End of hearing.)

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1 I HEREBY CERTIFY THAT THE FOREGOING IS A
2 CORRECT TRANSCRIPT FROM THE RECORD OF
3 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.
4 I FURTHER CERTIFY THAT THE TRANSCRIPT FEES
5 FORMAT COMPLY WITH THOSE PRESCRIBED BY THE
6 COURT AND THE JUDICIAL CONFERENCE OF THE
7 UNITED STATES.

8
9 S/Shawn McRoberts 08/13/2023

10 _____ DATE _____
11 SHAWN McROBERTS, RMR, CRR
12 FEDERAL OFFICIAL COURT REPORTER
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Shawn M. McRoberts, RMR, CRR
Federal Official Court Reporter

Concordance

< Dates >

08/13/2023 117:9.
August 31st 113:25.
AUGUST 7, 2023 1:13.
August 8th 30:10.
December 15th 51:3.
February 7th 51:7.
January, January 24th 51:5.
July 17th 51:11.
March 14th 30:12, 30:13.
May 22nd 48:4, 59:17.
November 2021 72:22.
September 11 4:20.
\$2.40 74:21.
\$2.55 74:21.
'182 28:17.
'501 28:22.
'518 45:21, 46:2.
'581 29:1, 29:6, 30:11, 45:11,
 46:18, 53:6, 53:23.
'835 45:10, 45:25.
'869 28:8, 29:12, 30:15.
'904 28:8, 28:22, 89:11, 89:15,
 93:15.
'905 28:9, 28:23, 29:11, 30:13.
'913 45:11, 45:25, 53:23.
'one 89:13.
-based 63:5.
 .
 .
< 0 > .
02 66:2.
 .
 .
< 1 > .
1 18:2, 21:4, 45:3, 59:24, 77:18,
 78:6, 81:16, 81:17, 82:14,
 82:21, 89:11, 89:15, 90:20,
 93:15.
10 92:19.
100 1:44, 2:14, 2:40.
10:00 15:18.
11 5:17, 5:23, 14:21, 14:24, 15:1,
 72:9, 73:22, 79:3, 79:4, 79:15,
 80:18, 80:19, 81:6.
114' 91:19.
118008 69:21.
11th 4:14, 113:24.
12 10:3.
13 21:1, 21:18, 22:3, 22:4, 22:9,

22:10, 22:11, 22:15, 22:17,
 22:22, 66:15.
14 74:4.
14th 9:7, 9:10.
15 22:10, 83:1, 97:25.
15-minute 44:22.
16-C 88:1.
177 17:24.
18 92:6, 93:10.
180 2:5.
1889 77:16.
1999 2:20.
1:15 87:17.
1st 113:25, 114:2.
 .
 .
< 2 > .
2 1:5, 3:4, 7:4, 7:6, 18:6, 18:12,
 21:5, 25:1, 25:10, 60:3, 66:10,
 66:11, 67:21, 79:14, 85:24,
 85:25.
20006-1101 2:21.
2001 68:9.
2014 69:24.
2016 39:23.
2017 39:23.
2018 28:15, 74:5.
2019 74:3.
202 2:22.
2020 63:8.
2021 28:6.
2022 30:11, 50:6, 51:3.
2023 30:12, 30:14.
203 2:26.
21-CV-400-JRG 1:5.
2100 2:26.
214 69:20.
22 41:19.
221-400 3:4.
226 23:22.
23 90:13, 109:22.
230 23:22.
24 81:24, 82:4, 82:16, 83:5, 83:6,
 83:7, 84:5.
244 68:8.
25-C 88:2.
26 81:24, 82:5, 82:17, 83:5, 83:6,
 83:7, 84:5.
263-3040 2:22.
27 60:18, 81:7, 81:11.

27-C 88:2.
277 88:25, 92:24.
280 90:16.
2800 2:34.
281 90:18, 97:6.
283 95:5, 95:8, 95:20.
285 90:22, 91:1, 94:23, 95:20,
 95:21, 96:1, 97:11, 97:14.
287 94:24, 95:21, 96:4, 96:5.
292 88:25, 92:24.
 .
 .
< 3 > .
3 25:11, 45:6, 60:6, 60:7, 72:5,
 74:3, 75:10, 77:3, 81:21,
 82:15, 82:21, 83:4, 87:21,
 87:25.
3(b) 88:18.
3(c)(1) 88:20.
3(c)(2) 97:18.
30 6:1, 6:2, 8:15.
301 92:24.
306 92:24.
31 27:13.
312 2:7, 2:28.
314 31:22.
34 30:10.
34735 74:4.
35 31:22, 62:13.
39 20:10.
 .
 .
< 4 > .
4 25:11, 25:15, 45:19, 60:10,
 60:13, 65:7, 72:8, 72:13,
 72:21, 73:5, 75:25, 76:9,
 76:17, 79:25, 81:6, 81:20,
 83:4, 88:1.
40 6:2, 33:2, 62:13, 105:3.
40- 61:9.
403 44:2, 61:2, 73:20, 98:8, 99:5,
 110:25.
45-year 61:9.
46 105:14.
47 105:25.
474 68:9.
48 104:20.
49 59:17.
4900 2:5.
495 68:12.

Concordance

4:00 113:21 .	.	79:19, 92:8, 95:10, 95:13 .
4th 113:23 .	.	achieve 47:5 .
.	< 8 > .	acknowledge 19:20 .
.	8 14:24, 72:9, 73:18, 78:22,	acknowledged 41:25, 80:1,
< 5 > .	78:23, 80:13, 81:6 .	90:7, 91:2 .
5 25:12, 46:10, 47:5, 65:10,	801 69:14 .	acknowledges 91:8 .
65:11, 72:9, 73:5, 73:6, 76:18,	801(d)(2) 69:11, 70:8 .	acted 103:24 .
79:25, 81:6, 88:5 .	801(d)(2)(c) 70:25, 71:18 .	active 4:21, 76:21, 93:19 .
500 2:14 .	8:30 15:23 .	activities 32:7, 63:5, 75:20, 79:1,
53 39:19 .	8th 114:18 .	107:4 .
54 40:6, 66:22, 67:23, 71:16 .	.	actual 42:19, 43:13, 79:10 .
55 41:4 .	.	actually 12:8, 15:4, 19:3, 39:14,
558-1368 2:28 .	< 9 > .	48:9, 49:23, 53:2, 58:12,
58 62:25 .	9 17:19, 38:19, 44:6, 47:19,	58:14, 73:7, 74:3, 91:10,
581 30:9 .	81:22, 82:4, 82:15, 83:6,	92:22 .
597-3301 2:16 .	83:11, 84:4 .	add 15:13 .
5:00 113:21 .	903 1:46, 2:16, 2:36, 2:42 .	addition 68:25 .
.	923-7464 2:42 .	additional 15:12, 45:24 .
.	923-8546 1:46 .	address 14:3, 17:17, 18:9, 27:1,
< 6 > .	97 20:23, 23:25, 25:4 .	60:11, 62:2, 65:14, 113:14 .
6 17:22, 25:13, 26:20, 44:7,	9:00 1:14 .	addressed 15:9, 37:17, 65:19 .
86:12 .		addresses 98:2 .
60601 2:27 .	DATE _____ 117:10 .	addressing 26:22, 36:22, 86:19 .
60601-6780 2:6 .	.	adequate 23:18, 36:3, 81:3 .
616-5600 2:7 .	.	adhesive 46:12, 48:25, 54:10,
617 98:6, 99:25 .	< A > .	57:20, 58:9, 59:15 .
620 68:12 .	A.M. 1:14, 15:25 .	adhesives 45:15, 52:2 .
624 108:7 .	able 11:13, 11:25, 12:7, 12:9,	adjourned 116:8 .
628 100:6 .	16:11, 23:4, 30:1, 33:22, 34:3,	adjustment 72:4 .
634 98:7 .	35:2, 102:24, 109:4, 115:6 .	admissibility 81:5 .
.	above 53:15, 96:1, 100:6 .	admissible 65:4, 70:4, 71:21,
.	ABOVE-ENTITLED 117:3 .	84:17 .
< 7 > .	absence 24:15, 47:24, 52:24,	admission 32:7, 32:11, 32:13,
7 47:2, 72:9, 73:7, 73:11, 73:12,	53:19 .	36:6, 67:11, 67:23, 68:20,
73:14, 77:8, 77:10, 77:16,	absent 48:1, 84:17 .	68:23, 69:4, 69:5, 69:10,
78:23, 80:5, 81:6 .	absolutely 111:4 .	69:13, 70:3, 70:4, 70:6,
70 18:13 .	abstract 18:15 .	71:19 .
702 98:8 .	accelerate 113:19 .	admission. 70:1 .
702(a) 98:17 .	accept 63:20, 104:23 .	admissions 68:3, 68:7, 68:10,
704 98:8 .	acceptable 87:14 .	68:18, 68:19, 69:7, 69:9,
704(a) 101:3 .	access 39:12, 39:15, 41:1 .	69:16 .
73 18:21 .	accomplish 112:8 .	admit 31:11, 37:22, 64:16, 71:3 .
74 24:5 .	accomplished 12:25 .	admitted 31:11, 31:12, 63:19,
75503 2:35 .	accordance 47:21 .	67:19, 98:13 .
75670 1:45, 2:41 .	according 47:14, 56:11 .	advice 27:15, 98:4, 99:20, 102:6,
75702 2:15 .	accounting 79:8 .	106:8, 106:14, 110:16 .
792-7080 2:36 .	accuracy 111:2, 111:17 .	advise 115:8 .
7:00 15:25, 16:3 .	accused 20:5, 21:13, 21:17,	advised 4:25 .
7:30 15:21, 15:23, 16:4 .	22:1, 22:6, 25:6, 43:12, 43:15,	advising 107:23 .
7th 9:16, 113:24 .	72:10, 76:7, 76:11, 79:11,	advisory 101:4 .

Concordance

aerial 49:2 .	75:4, 75:20, 79:13, 80:22 .	57:24, 67:15, 68:22, 70:11,
affect 16:25 .	analysis 19:5, 36:3, 77:20,	85:19, 86:23, 87:10, 88:11,
afternoon 87:19, 88:12, 92:20,	88:20, 90:12, 90:22, 92:12,	92:25, 95:5, 95:24, 102:4 .
113:21 .	96:24, 98:19, 98:20, 100:25,	argued 55:1, 55:4, 55:12 .
afterwards 72:18 .	102:9, 103:8, 106:1, 110:12,	argues 51:1 .
agencies 77:22 .	110:25 .	argument 5:22, 18:7, 20:4,
ago 77:3 .	analyze 22:22 .	22:16, 27:9, 30:18, 48:20,
agree 9:7, 16:6, 16:9, 23:8,	analyzed 35:8 .	52:21, 54:18, 54:23, 56:21,
31:14, 36:5, 36:20, 64:14,	analyzing 96:20 .	58:21, 63:14, 65:18, 66:6,
87:15, 89:4, 97:17, 109:8 .	and/or 76:22, 88:24, 89:14,	79:12, 93:10, 96:17, 99:5,
agreed 15:8, 25:11, 71:25, 82:25,	90:19, 90:21, 91:12, 93:21,	101:24, 101:25, 109:20,
83:3, 89:19, 90:4 .	95:11, 95:15, 97:8 .	112:3 .
agreeing 26:4 .	ANDREW 2:17 .	arguments 38:12, 47:9, 109:24 .
agreement 13:21, 26:6, 26:8,	Andy 3:6 .	arises 102:17 .
26:10, 26:16, 73:18, 78:24,	animus 7:25, 8:5 .	armed 108:22 .
80:5, 80:13, 81:17, 109:5 .	answer 6:7, 6:15, 37:13 .	around 30:15, 42:10, 44:1,
agreements 17:14, 60:8, 65:12,	anticipate 14:9, 115:9 .	109:22 .
73:7, 73:13, 77:13, 78:18,	anticipating 107:21 .	arranged 85:15 .
80:12 .	anyway 17:4, 111:19, 111:24 .	arrangement 15:14, 45:15,
ahead 32:21, 55:22, 66:17, 85:5,	apart 52:25, 110:3 .	46:11, 48:25, 52:2, 57:20,
87:10, 87:16 .	Apologies 15:2 .	58:9, 59:14 .
aid 11:10 .	apologize 61:7, 80:16, 82:7,	arrived 78:11 .
al 1:12 .	82:13, 95:22 .	art 28:20, 33:5, 47:22, 52:22,
allegation 41:25, 66:22, 67:20,	Appeal 10:24, 29:25, 101:22 .	54:6, 81:18, 82:2, 82:10, 83:9,
74:11 .	appear 16:17, 92:10 .	84:6, 90:8, 94:18, 103:9,
allegations 27:16 .	appearances 3:5 .	105:7, 105:19, 106:3, 106:7,
allege 30:21 .	appears 73:12, 109:8 .	106:14, 107:21 .
alleged 60:14, 60:22, 61:20,	appellate 69:22 .	Article 60:18, 77:18, 78:6 .
97:12, 107:5 .	appended 79:15 .	Arts 74:3 .
alleges 66:25 .	applications 20:24, 23:25 .	aside 42:13, 101:7 .
allow 4:15, 11:6, 32:11, 38:20,	applied 98:18, 105:19, 107:21 .	aside"--it 100:7 .
41:14, 44:7, 71:15, 99:6,	applies 55:17 .	aspect 100:19 .
101:6 .	apply 68:4, 69:12, 70:8, 106:15,	aspects 106:6, 108:17, 109:4 .
allowed 34:5, 39:25, 42:18,	107:12 .	assert 103:24 .
60:23, 99:12, 109:14 .	applying 92:2 .	asserted 10:8, 49:6, 83:1 .
allowing 23:1, 27:10, 32:12,	appointed 112:16 .	asserting 10:11, 25:20, 34:14 .
37:24 .	appreciate 113:18 .	assessment 36:21, 37:4 .
alluded 22:12 .	approach 21:2, 66:8, 84:19,	assist 98:16 .
almost 75:16 .	84:22, 85:19 .	associated 61:11 .
alone 70:17 .	appropriate 7:24, 8:9, 27:21,	association 60:25, 62:16 .
already 12:3, 84:14, 102:11,	32:4, 37:21, 42:4, 50:18 .	assume 87:13, 114:9 .
114:10 .	approximately 20:23, 23:24 .	assumption 64:16 .
alter 74:13 .	Arch 2:25, 4:2 .	assured 7:8 .
altered 18:24 .	area 46:5, 57:6, 105:6, 105:15,	attack 35:25 .
alternates 8:24 .	105:22, 106:12, 107:18,	attempt 85:16, 89:18 .
Alternatively 57:13 .	109:12, 111:21 .	attempts 6:25, 39:20 .
although 75:15 .	areas 99:7 .	attended 61:11, 61:20 .
amendment 48:20, 56:5 .	arguably 29:22 .	attention 68:5 .
America 72:22, 72:25, 73:22,	argue 5:21, 14:15, 20:11, 21:6,	attorney 28:14, 54:18, 54:23,
74:9, 74:10, 74:12, 74:22,	30:24, 34:17, 34:18, 34:24,	107:23, 107:24 .

Concordance

attorneys 36:3, 37:8.
Audio 66:12, 66:13, 69:1, 69:2, 70:14, 70:17, 70:18, 71:6.
August 9:7, 9:10.
authorities 68:5.
authority 55:15.
authorized 27:23, 71:1, 71:2, 71:5.
available 9:14.
avoid 43:9.
aware 4:12, 4:16, 14:11, 63:15, 98:24.
away 4:18.
axial 46:20.
 .
 .
< B > .
baby 72:23.
back 15:24, 16:10, 24:3, 27:3, 28:14, 44:22, 50:5, 62:3, 81:7, 86:24, 87:11, 97:4, 102:14, 105:3, 112:15, 113:9.
backdoor 85:17.
background 27:14, 76:2, 89:17, 105:11, 107:6, 108:20.
Bally 68:8.
band 50:2.
bar 36:6.
bare 37:5.
base 77:6, 78:12, 80:1.
base--in 77:1.
based 5:16, 6:25, 28:11, 34:19, 35:4, 35:19, 39:13, 60:7, 64:16, 65:12, 66:15, 70:17, 71:17, 72:2, 82:22, 83:2, 86:15, 93:11, 102:8, 103:8, 106:11, 108:15.
bases 98:21.
basically 8:13, 9:20, 28:15, 29:3, 30:21, 39:23, 41:5, 41:11, 47:14, 47:16, 50:22, 51:23, 53:8, 83:13, 103:7.
basis 8:19, 10:18, 16:23, 36:4, 39:21, 41:24, 44:13, 71:19, 72:3, 73:5, 110:3.
Bates 80:21.
batteries 18:25, 20:19, 20:21, 23:12, 40:13, 62:6, 64:3, 72:23, 73:19, 74:16, 74:20, 75:23, 76:7, 78:9, 79:19, 106:12.
battery 39:20, 39:22, 40:2, 40:8, 40:10, 40:24, 47:11, 47:21, 47:22, 47:23, 48:14, 53:25, 54:2, 54:24, 62:8, 79:11, 81:23, 100:10, 100:12, 100:16, 100:18, 100:24, 106:13, 109:9.
bead 89:8, 89:16, 96:25.
beaded-over 103:10.
beading 46:12, 52:5, 52:10, 55:3, 82:23, 83:3.
beads 90:21, 91:14, 91:22, 95:11, 97:9.
became 30:8, 30:19, 31:9, 39:25.
become 40:14.
becomes 9:3, 110:15, 110:17.
behalf 6:13, 17:11, 66:12, 68:25, 87:23.
behind 102:24.
Beijing 80:6.
Bejin 28:13, 104:9, 104:10, 106:22.
belief 29:16, 31:2, 67:3, 67:12, 68:15, 68:17, 69:7, 69:25, 70:12, 70:14, 70:24.
belies 79:16.
believes 50:25.
below 28:11, 51:22.
best 69:17, 113:15.
better 37:25.
beyond 9:22, 31:3, 90:14, 111:21.
biases 7:20.
Big 60:20, 60:21, 75:16, 108:2.
binding 68:18, 68:22, 70:1, 70:4, 70:6.
bit 36:23, 50:19.
Blount 104:23.
blue 47:8.
Board 29:25, 101:22.
Bob 3:13, 18:13.
bolster 99:6.
bottom 8:14, 9:20, 50:21, 51:14, 53:14, 63:4, 63:13, 80:21, 90:1, 110:12.
Boulevard 2:34.
brand 62:12, 76:23.
brands 75:22, 78:20.
break 86:23, 114:16.
Brenner 81:22, 82:15, 83:11, 83:18.
Brief 27:4, 44:23, 51:5, 51:6, 88:18, 89:24.
briefed 88:15.
briefed--we 36:25.
briefing 51:4, 96:9, 99:10.
briefly 50:15, 96:18.
Briley 99:16.
bring 33:2, 68:4, 75:23.
brought 12:1, 63:8.
Brown 2:19, 3:23, 28:11, 28:16, 29:7, 51:24, 54:7, 100:23, 106:2, 108:2, 108:4.
Bucket 75:15, 75:16, 75:19, 76:14, 76:25, 81:16, 81:17, 82:4, 82:9, 83:4, 85:24, 86:19, 87:21, 87:25, 88:1, 88:5.
buckets 65:25, 75:16, 101:9, 101:10.
building 39:13.
business 20:18, 22:14, 76:11, 79:5, 99:2, 99:14, 100:2, 101:25, 102:22, 103:3, 103:15, 106:15, 106:16, 107:1, 107:7, 109:10.
button 39:21, 45:16, 45:22, 46:19, 52:3, 63:2, 63:6, 63:9, 76:7, 76:11, 78:10, 79:11, 79:19, 83:24, 84:7, 84:8, 84:13, 84:15, 85:10, 91:23.
buyer 77:24.
 .
 .
< C > .
calculation 78:10.
calendar 114:1.
call 14:8, 40:17, 77:13, 103:13, 104:5, 106:21, 111:8, 114:9.
called 60:20, 73:23, 81:16, 90:9, 107:3.
capacities 107:9, 107:11, 107:16.
capacity 18:3.
capture 25:7.
career 61:9.
carries 93:16.
carry 38:15.
carrying 40:5.

Concordance

cartoon-type 86:1 .	characterization 31:14, 39:9 .	clearing 107:16 .
case--and 96:22 .	characterize 42:21, 42:23, 43:2 .	clearly 45:20, 57:1, 59:11, 92:1 .
case--in 70:13 .	characterizing 41:23, 42:6, 43:18 .	Clendening 9:9, 9:16 .
case-specific 42:12 .	charged 32:9 .	clerk 15:18 .
cases 4:19, 4:20, 16:22, 39:6, 68:16, 99:11, 99:16, 102:15, 115:22 .	check 102:24 .	client 8:10, 34:13, 36:8, 36:11 .
casing 46:5, 47:11, 53:25, 54:2, 54:24, 57:6 .	Chicago 2:3, 2:6, 2:27, 115:3 .	clients 85:7 .
cast 29:19, 32:2, 37:6 .	China 62:10, 62:11, 74:9, 74:10, 74:13, 74:22, 75:1, 75:3, 75:6, 75:8, 75:20, 75:22, 76:2, 76:3, 76:6, 77:14, 77:15, 78:3, 78:7, 78:9, 78:18, 79:1, 79:13, 79:16, 79:17, 80:19, 80:20, 80:24 .	close 22:15, 28:2, 59:9, 92:22 .
category 76:22 .	China. 78:1 .	closed 27:22, 45:16, 46:2, 46:3, 52:10, 57:4, 57:5 .
CAUSE 1:5, 8:17, 19:9, 85:19 .	Chinese 6:16, 7:10, 7:11, 7:21, 8:1, 8:3, 28:12, 28:17, 60:14, 75:22, 77:22, 100:25 .	closes 52:2 .
caused 100:10 .	choice 38:11 .	closest 52:5 .
cease 48:1 .	choose 63:20 .	closing 6:4, 52:6, 54:9 .
cell 23:12, 25:16, 25:23, 39:21, 45:16, 45:22, 46:2, 46:19, 52:6, 52:9, 54:8, 54:9, 57:4, 63:2, 76:7, 79:11, 79:19, 83:25, 84:7, 84:14, 84:15, 85:11, 88:19, 90:22, 91:1, 91:23 .	chosen 9:3 .	closings 5:19, 6:3 .
cells 19:4, 23:17, 24:9, 24:13, 24:20, 25:4, 25:6, 46:19, 52:3, 63:6, 63:9, 76:11, 78:11, 84:8 .	CI 74:5 .	closure 40:8, 40:17, 54:11, 55:2, 55:11 .
cells--and 20:25 .	CI. 74:7 .	CO. 1:11 .
cells--for 20:23 .	Circuit 39:6, 48:19, 68:9, 102:18 .	coated 93:19 .
certain 8:5, 20:16, 35:3, 35:24, 58:13, 77:22, 87:7, 87:8, 88:14, 97:24, 107:13 .	circumstances 8:9, 19:20, 34:1, 110:11 .	coin 19:4, 20:23, 20:24, 23:12, 23:17, 24:9, 24:13, 24:20, 25:4, 25:6, 25:16, 25:22, 25:23 .
Certainly 7:1, 7:7, 7:23, 8:4, 15:11, 16:9, 17:16, 22:19, 22:23, 24:20, 29:20, 30:24, 55:18, 58:8, 63:19, 64:8, 64:12, 69:5, 94:16, 105:18, 108:21, 108:22, 109:7, 109:18 .	circumstantial 61:20, 64:12 .	collector 94:14 .
CERTIFY 117:1, 117:4 .	circumvent 40:15, 41:9 .	collectors 93:17 .
challenge 73:16, 104:25 .	cite 34:3, 68:8, 69:19, 74:2 .	combination 85:12, 107:24 .
challenged 28:9 .	cited 55:15, 74:2 .	combine 108:10 .
challenges 8:17 .	cites 99:11 .	comes 22:7, 39:3, 39:19, 52:5, 60:16 .
challenging 109:17 .	citing 56:22, 70:5, 102:21 .	coming 4:24, 7:24, 67:19 .
chambers 4:23, 15:20, 15:25, 16:3 .	civil 8:25 .	comments 79:22 .
chance 6:3, 28:7, 32:22, 66:18, 82:19, 96:12 .	CKP 74:3, 74:6 .	commercial 63:18, 64:10, 64:11 .
change 50:6, 101:5 .	claimed 59:14, 59:15, 97:13 .	committee 101:5 .
changed 50:5 .	claiming 20:15, 84:21 .	companies 7:21, 80:11, 105:16 .
changes 15:5 .	claims 30:5, 31:24, 43:12, 48:13, 49:6, 52:21, 58:14, 82:23, 83:1, 83:2, 83:3, 93:16, 105:12, 105:19, 105:21 .	Company 7:10, 7:11, 66:13, 70:18, 73:23, 80:8, 80:9, 104:1, 105:16 .
channels 63:18, 64:11 .	clarification 7:16, 11:18, 55:24, 72:3, 82:20 .	comparing 92:8 .
	clarified 39:11 .	competence 98:22, 101:14, 102:13, 102:25, 105:1, 109:12, 110:13, 111:21 .
	clarify 48:11 .	competency 30:25, 35:25, 36:21, 37:1 .
	class 62:11, 76:22 .	competent 33:14, 35:2, 35:7, 35:20, 103:5 .
	clear 11:21, 26:15, 39:6, 68:11, 89:2, 90:13, 92:12, 101:4, 107:19 .	compiled 77:5 .
	clearance 105:15, 105:17 .	complains 58:11 .
		complaint 66:11, 69:1, 69:9 .
		completely 40:10, 78:2 .
		completeness 99:1 .
		COMPLY 117:5 .

Concordance

component 85:12, 94:14 .
components 85:13 .
components. 93:22 .
comprising 58:10 .
compromise 24:24, 109:5 .
compute 77:6 .
conceivably 12:21 .
concept 18:19, 23:2, 97:13, 98:11, 98:12, 99:15 .
concern 16:21, 23:3, 23:11, 23:12, 23:13, 39:4, 42:24, 43:23 .
concerned 6:24, 8:5 .
concerning 18:25 .
concerns 109:8, 115:3 .
concession 68:7 .
conclude 31:6, 41:2, 41:13, 42:11, 47:10, 94:12, 105:21 .
concluded 27:10, 28:19 .
concludes 41:8, 90:23 .
concluding 91:1, 91:3 .
conclusion 35:8, 37:22, 43:11, 94:8, 95:2, 95:4, 95:5 .
conclusions 99:4, 99:22, 99:25, 100:16, 101:2, 101:6, 101:7, 105:8, 106:10 .
conclusory 19:2 .
condition 47:11, 47:13, 47:15, 47:17, 47:18, 49:13, 54:1, 54:3, 57:17, 57:18, 57:19, 58:5, 58:6, 58:8, 59:12 .
conduct 33:21 .
conducted 77:19 .
conductor 96:3, 108:12 .
Confectionary 74:3 .
confer 15:12, 15:15, 16:7, 17:3, 86:3, 86:25 .
CONFERENCE 1:22, 3:2, 64:7, 117:6 .
conferred 48:7, 112:12 .
confers 73:3 .
confidential 9:25, 27:20, 72:14, 72:16 .
confine 97:20 .
confirmed 114:16 .
confirms 77:18 .
confuse 82:2 .
confusion 20:2, 29:24, 61:1 .
connect 94:13, 95:14 .
connected 93:11, 93:20 .

Connecticut 74:5 .
connecting 95:17, 95:18 .
connection. 45:9, 47:24, 54:25 .
connections 88:24, 89:14, 90:19, 90:20, 91:12, 93:6, 93:21, 95:15, 97:7, 97:8 .
connections. 95:15 .
consent 9:2 .
consequences 109:2 .
consider 5:10, 11:1, 15:5, 38:4, 38:14, 50:16, 67:11, 105:7 .
consideration 30:6, 34:6 .
considered 30:4, 33:6, 41:5, 56:6, 57:15 .
considering 37:18 .
considers 76:5 .
consistent 45:17, 49:12, 58:4, 59:15, 106:9 .
consistently 48:17, 48:23, 57:3, 57:9 .
constitute 51:1, 70:1 .
construction 10:14, 10:16, 10:17, 45:3, 45:12, 50:14, 50:17, 51:4, 51:6, 51:9, 51:18, 51:23, 54:9, 55:6, 55:19, 58:22, 59:23, 59:25, 88:23, 89:21, 89:24, 92:4, 93:8, 93:9, 96:11 .
constructions 89:22 .
construe 53:3, 53:7, 57:16, 57:21, 57:22, 58:23, 59:1, 59:9, 89:19, 89:25, 90:3 .
construed 10:17, 58:1, 59:1, 59:4, 96:22 .
construing 59:3, 59:8, 92:11 .
consult 9:19 .
consultant 107:9 .
contain 94:25 .
contains 16:10 .
contemplating 27:4 .
contend 88:22, 93:25, 96:11, 96:12 .
contended 55:10 .
contending 54:13 .
contends 62:4, 85:8, 94:24 .
contention 61:16, 73:3, 73:4 .
contentions 50:5, 50:8 .
contents 101:17 .
context 34:9, 36:23, 41:15, 50:11, 52:20, 53:17, 70:8,

98:25 .
continue 12:7, 27:8, 29:20, 29:21, 35:4 .
continued 101:22 .
continues 66:25 .
continuing 25:9 .
contract 62:9, 70:20, 73:8, 73:13, 75:22, 76:22, 77:14, 77:19, 77:21, 77:24, 78:18, 80:10 .
contracts 78:15 .
contradict 70:3 .
contradicts 93:9 .
contrary 53:25, 54:5, 71:20, 106:24, 108:4 .
contributed 20:17, 22:13, 22:18, 22:20 .
controls 49:21 .
convoluted 13:12 .
cooperation 77:21 .
coordinating 115:23 .
copies 10:11, 10:12, 43:22, 66:4 .
copy 16:1, 41:11 .
copycat 21:7, 43:2 .
copying 17:20, 38:17, 38:20, 38:23, 39:1, 39:4, 39:7, 41:3, 41:14, 41:24, 42:1, 42:3, 42:6, 42:10, 42:19, 42:21, 42:24, 43:1, 43:10, 43:16, 44:1, 44:7, 44:14 .
core 101:13, 102:13 .
Corinth 69:20 .
corners 35:20 .
corporate 12:18, 19:13, 74:7, 74:12, 76:5, 79:18 .
CORRECT 17:12, 20:6, 33:15, 35:19, 35:23, 60:5, 67:24, 75:2, 97:19, 106:18, 117:2 .
correctly 107:21 .
correctness 102:14, 102:16, 110:14, 110:20, 110:22, 111:23 .
correspondence 82:25 .
cost 21:2 .
counsel--in 34:19 .
couple 14:15, 14:18, 33:3, 36:18, 53:3, 55:24, 75:16, 82:5, 93:16 .
course 5:18, 32:21, 43:20, 110:7,

Concordance

110:15, 113:11 .	104:17, 104:18, 109:16, 111:4, 111:9, 111:15, 111:25 .	13:16, 15:4, 15:9, 18:20, 32:8, 71:10, 81:18, 82:9, 92:10, 109:1 .
court--or 29:4 .	customer 62:12, 63:7, 78:8 .	Defense 5:3, 5:6, 23:7, 27:16, 33:7, 34:11, 34:12, 34:17, 34:23, 36:7, 36:12, 36:13, 37:12, 37:22, 81:19, 81:20, 81:25, 98:5, 103:24, 110:16 .
courtroom 27:22, 28:1 .	customers 20:19, 67:2, 67:4 .	deficiencies 100:7, 105:5, 105:10, 106:2 .
cover 19:3, 20:4, 21:13, 21:17, 22:1, 25:6, 43:12, 103:10 .	cut 32:17, 32:18 .	deficient 106:5, 106:10 .
covered 24:24, 44:5 .	.	definition 93:5 .
covering 20:22, 24:9, 24:11, 24:20 .	.	degree 111:1 .
covers 19:24 .	< D > .	delays 16:25 .
crafted 42:2 .	damages 20:20, 74:1, 76:24, 76:25, 78:12, 80:1, 80:3 .	deliberate 8:25, 68:10 .
create 23:4, 29:25, 39:20 .	Data 60:20, 60:21, 77:6 .	deliberations 11:7 .
created 40:1, 96:2 .	date 15:11, 30:14, 30:21 .	delivered 10:4, 16:3 .
creates 18:15, 54:24 .	dated 30:12, 48:4 .	demand 39:23, 40:13 .
creating 80:24 .	dates 30:7, 115:16 .	demonstrating 41:15 .
credentials 99:6, 109:18, 110:10 .	Daubert 26:8, 35:17, 51:13, 65:14, 65:18 .	demonstrative 15:8, 16:1, 16:2 .
crimp 49:25, 50:2 .	day 10:1, 16:19, 16:20, 16:24, 17:1, 17:3, 17:14, 33:14, 113:3, 113:5, 113:6, 113:13, 113:16 .	demonstratives 14:22 .
crimped 54:8 .	DC 2:19, 2:21 .	denial 27:11, 30:12, 30:13, 34:8 .
crimping 45:15, 45:20, 45:22, 48:24, 52:2, 56:25, 57:2, 57:20, 58:9, 59:14 .	DCO 9:7 .	denials 25:14, 31:4, 101:20 .
critiques 98:20, 100:7, 100:8, 101:13, 102:8, 102:12, 104:15, 109:21, 109:23 .	deadline 9:6 .	denials--"the 100:9 .
critiquing 95:24 .	deal 36:10 .	denied 29:8, 29:14, 57:10 .
cross 7:12, 101:15, 102:5, 111:5, 111:10, 111:11, 111:17 .	dealing 105:11 .	deny 92:25 .
crosses 92:1 .	deals 22:11, 32:7 .	denying 53:6 .
CRR 1:43, 2:39, 117:11 .	December 51:2 .	depose 64:20 .
crux 67:12 .	decide 16:11, 36:8, 37:21, 53:8 .	deposed 104:6, 104:8, 104:10, 111:10 .
CULBERTSON 2:32, 2:37, 3:22, 3:23, 4:2, 4:6, 4:9, 4:10, 4:11, 7:4, 7:5, 7:6, 11:17, 11:21, 41:19, 41:21, 42:16, 42:20, 43:19, 44:15, 44:17, 44:18, 60:11, 60:13, 61:23, 61:24, 112:25 .	decided 5:6, 110:17 .	deposition 12:18, 13:7, 16:17, 17:2, 19:4, 48:5, 90:7, 90:8, 91:2, 91:7, 94:6, 104:4, 104:6, 113:6, 113:21, 114:4, 114:10 .
cup 45:7, 45:13, 46:2, 46:4, 46:5, 46:6, 46:19, 46:23, 47:3, 47:6, 49:21, 51:21, 52:25, 53:12, 57:4, 57:5, 57:7, 57:8 .	decides 102:1 .	deposition--i 98:13 .
current 6:10, 69:8, 93:17, 94:13 .	decision 4:22, 5:2, 12:8, 27:8, 27:11, 29:2, 30:10, 30:11, 31:4, 31:14, 31:17, 31:19, 31:21, 32:3, 33:24, 36:9, 47:14, 49:12, 53:6, 53:23, 54:21, 65:1, 88:6, 102:18, 114:18, 115:21 .	deposition--or 90:11 .
currently 4:19 .	decision-maker 102:22, 103:4, 103:5, 103:15 .	depositions 12:15, 13:10, 13:17, 13:19, 13:22, 16:23, 51:12, 104:16, 113:2, 113:13, 113:16 .
CURTIN 2:29, 4:6, 4:7, 35:16, 41:20, 92:19, 94:2, 94:5, 94:11, 94:22, 95:1, 96:15, 96:16, 96:19, 97:25, 103:12, 103:14, 103:17, 103:23, 104:7, 104:10, 104:14,	decision-makers 99:14 .	Deputy-in-charge 9:9 .
	decisions 25:14, 29:17, 31:8, 31:10, 31:11, 32:1, 32:3, 32:6, 34:8, 37:3, 37:6, 69:22, 88:5, 100:9, 101:21, 102:19, 106:20, 106:24, 107:12 .	derive 108:13 .
	decisions. 100:13 .	derives 108:15 .
	declaratory 66:11, 67:13 .	describe 46:2, 54:14, 57:4 .
	deemed 7:12, 51:15, 69:5, 69:9, 72:15 .	described 23:1, 44:8, 46:18, 54:11, 113:11 .
	Defendants 1:14, 2:19, 5:1,	describes 54:9, 83:12 .
		describing 49:5 .
		design 39:19, 40:7, 40:12, 40:18, 40:19, 40:24, 41:11, 43:8 .

Concordance

designations 16:18 .	discuss 12:2, 23:1, 35:16 .	door 22:17, 22:19, 84:20, 85:19 .
designed 40:8, 40:16, 41:10, 60:15 .	discussed 14:23, 60:22, 77:3, 91:15, 101:20, 102:12, 105:7, 106:7 .	doubt 29:19, 32:2, 37:7, 42:1 .
designs 42:22, 43:14 .	discusses 90:16 .	down 16:11, 25:9, 26:1, 29:18, 40:9, 60:15, 60:25, 63:25, 71:16, 110:6 .
destroyed 9:24 .	discussion 34:7, 72:15, 81:10, 81:17, 82:1, 86:16 .	drastic 39:22 .
destroying 64:7 .	disingenuous 8:4 .	draw 102:6, 112:10 .
detail 36:23, 41:7, 106:19 .	dismissed 66:14, 67:17 .	drawing 82:16, 82:17, 85:25, 86:1 .
detailed 9:19 .	disparage 85:25 .	drawn 43:11 .
details 9:16, 11:14, 15:7, 23:9 .	disparagement 6:25 .	drop 10:2 .
determination 114:1 .	displayed 85:8 .	dropped 10:9, 34:12, 37:11, 88:17, 88:18 .
determinations 30:8 .	dispute 14:2, 16:1, 16:23, 17:1, 18:20, 67:9, 93:2, 93:4, 94:19 .	drumming 76:10 .
determine 7:19, 114:13, 115:5 .	disputes 14:21, 15:22, 15:25, 16:11, 16:17, 112:16 .	DTX 83:11, 86:12 .
determined 42:4, 103:6 .	disputes--that 98:14 .	due 40:21, 115:18 .
determining 79:10, 107:20 .	disseminate 9:22 .	duplicate 71:25 .
develop 7:22, 64:24, 101:12, 101:15 .	disseminated 62:17 .	During 4:16, 5:19, 7:22, 11:6, 13:1, 13:9, 49:24, 50:13, 50:16, 51:8, 58:21, 73:3, 90:6, 91:2, 91:6 .
developed 42:14, 43:4 .	distinguish 45:22, 52:21 .	.
developing 39:13 .	distinguished 56:25, 110:23 .	.
Development 43:7, 43:14, 55:16 .	District 1:1, 1:2, 50:20, 66:12, 67:14, 67:16, 67:17, 68:13, 68:16, 69:21, 69:24, 74:4, 99:16 .	< E > .
differences 42:22 .	DIVISION 1:3 .	E. 1:44, 2:14, 2:40 .
different 48:8, 58:17, 73:7, 73:13, 77:4, 77:14, 93:23, 97:9 .	docket 3:4, 4:20, 4:24, 115:23 .	ear 40:3 .
differing 43:25 .	Doctor 35:17, 36:24, 41:5, 87:9, 95:24, 97:24, 98:2, 98:12, 99:4, 99:24, 100:15, 101:10, 101:25, 102:8, 102:12, 104:11, 105:4, 109:17, 109:24, 110:9, 110:23, 111:21 .	earbuds 62:10 .
difficult 13:11, 13:13, 64:16 .	Document 17:24, 56:4, 64:15, 67:18, 67:20, 71:16, 72:4, 73:20, 76:9, 80:20 .	earlier 83:13, 86:9, 86:16, 98:25, 101:20, 102:15 .
dire 6:2, 6:7, 6:15, 7:19, 7:22, 8:15 .	documents 39:12, 40:12, 41:8, 43:1, 43:7, 43:21, 43:22, 72:8, 72:10, 73:6, 73:10, 76:13, 76:14, 76:25, 77:9, 80:19, 81:4, 83:9, 84:6, 84:14, 84:16, 84:18 .	earliest 30:22 .
direct 22:5, 94:19, 95:16, 97:1, 97:2 .	doing 8:3, 42:17, 92:6, 92:13, 96:4, 105:2 .	early 16:7, 39:9, 50:8, 102:19 .
directed 19:23 .	done 4:17, 4:18, 5:11, 8:14, 9:11, 19:5, 33:13, 73:13, 91:18, 94:16, 100:18 .	earphones 39:25 .
direction 46:20, 49:3, 56:10 .	Dongguan 80:8 .	easier 28:24 .
directly 93:11, 93:20, 94:13, 95:18, 96:1, 105:5, 105:9, 106:21 .		Eastern 1:2, 68:13, 69:24 .
disagree 33:10, 96:25 .		economic 26:9 .
disagreed 33:9, 33:16, 37:4 .		edge 46:5, 57:7 .
disagreements 98:20, 112:13 .		editing 16:22 .
disavow 46:11, 48:21, 57:1 .		effect 5:14, 43:19, 55:5, 70:2, 84:18, 110:8, 110:9 .
disavowal 51:2, 55:18, 55:19, 56:16 .		efficient 40:2 .
disavowals 55:17 .		effort 39:8, 41:9, 114:24 .
disavowed 45:20, 48:21, 56:6 .		efforts 40:7, 76:19 .
disclaimed 56:22, 59:13 .		ego 74:13 .
disclaimer 51:2, 55:5, 55:16, 56:15 .		eight 8:22, 8:25, 9:1, 9:3 .
disclaims 56:23 .		either 5:20, 6:6, 9:23, 14:8, 27:11, 28:24, 44:9, 86:12, 113:7, 116:1 .
disclosed 21:22 .		elected 50:14 .
discovery 12:25, 13:2, 13:9, 13:10, 13:19, 62:20, 76:14 .		electrode 93:19 .
		Electronics 80:8 .

Concordance

element 93:15.
elements 20:17, 22:13.
elicit 85:7.
eliminate 101:3.
email 15:18, 26:15, 65:24, 90:1.
embedded 58:13.
embodiment 89:6, 94:17.
embodiments 49:7, 52:17, 92:9, 92:14.
employees 12:19.
encountered 11:18.
encouragement 76:21.
End 15:15, 16:10, 21:1, 33:14, 42:10, 55:15, 62:5, 62:6, 62:14, 63:18, 64:3, 88:4, 112:19, 112:20, 116:9.
ending 64:11, 74:16.
Energizer 105:16.
Energy 1:11, 3:3, 3:23, 66:13.
engaged 99:24.
engaging 96:10.
engineer 99:17, 99:21.
engineering 40:25.
English 77:15.
enough 10:5.
ensures 46:23.
enter 85:1.
entire 40:1, 60:24, 95:8.
entirely 85:17.
entirety 96:14.
entities 79:18.
entitled 17:24, 84:12, 111:22.
entity 29:25.
entrant 40:14.
equal 48:1.
Equipment 68:11.
equitable 34:7.
especially 7:24.
essentially 18:22, 19:11, 46:24, 49:4, 49:10, 55:9, 101:10.
established 68:10, 80:6.
estoppel 55:25.
et 1:12.
evaluate 11:7, 37:15.
evaluated 110:13.
evaluating 33:11, 103:1.
Evanston 69:20.
Eve--excuse 61:6.
evening 15:19, 113:21.
event 64:20, 114:19.


events 50:20, 50:21, 50:22, 106:18.
eventually 33:9, 33:16, 40:19.
Eveready 105:16.
everybody 26:15.
everyone 101:9.
everything 32:19, 37:25, 38:12, 94:5, 106:9.
everywhere 76:8.
evidentiary 21:9.
exact 30:14, 43:4, 50:1.
exactly 6:24, 25:25, 67:6, 92:6, 92:12, 102:21.
examination 101:15, 111:5.
examine 102:5, 111:10, 111:11.
examining 111:17.
example 7:21, 20:23, 27:17, 46:16, 53:5, 72:13, 77:16, 90:12, 90:16, 91:8, 102:4, 106:16.
examples 52:12, 52:14, 90:14, 90:17, 105:23.
except 88:17.
excerpt 90:1.
excerpts 91:11, 114:11.
exchange 15:8, 26:15, 112:19.
exclude 7:1, 19:16, 19:23, 20:3, 25:1, 36:24, 57:20, 60:14, 64:19, 87:7, 87:8, 88:13, 88:16, 92:23, 97:24, 98:1.
excluded 19:10, 21:11, 61:22, 98:8, 99:17, 99:21.
excluding 45:14, 52:1, 73:5.
exclusive 49:1, 49:2, 52:8, 55:11.
Exclusively 45:13, 46:15, 46:20, 48:14, 49:3, 51:25, 52:12, 52:13, 52:17, 58:2.
excuse 29:4, 90:11.
exemplary 51:19.
exerting 46:4, 57:6.
Exhibits 15:8, 65:19, 65:23, 66:4, 66:5, 75:17, 76:4, 77:5, 82:5, 85:9, 86:21, 88:2, 88:5, 112:11.
existed 107:17.
expanded 39:10.
expect 4:24, 6:2, 21:8, 104:2, 104:15, 111:12.
expected 102:23, 102:24.

expecting 15:23.
expediency 87:24.
experience 6:8, 100:17, 106:11, 107:8, 107:18.
expert 18:22, 20:15, 20:20, 22:21, 22:23, 24:15, 36:24, 41:5, 48:3, 48:6, 51:12, 56:14, 59:16, 59:17, 76:24, 89:1, 89:3, 89:19, 90:11, 92:2, 92:5, 96:10, 96:20, 99:3, 99:12, 102:23, 105:4, 110:23, 111:14.
expertise 98:15, 105:7, 105:22, 110:10.
experts 26:9, 99:15, 101:6.
explain 46:15, 49:9, 57:2, 71:9.
explained 47:5, 48:25, 56:1, 56:3, 56:5, 56:12, 56:18, 57:9, 58:16, 59:5, 59:18.
explaining 24:16, 49:11.
explains 106:5.
explanation 46:1, 49:13, 57:11, 57:15, 58:4, 58:18, 59:1.
explanations 47:9.
explicitly 54:14.
express 100:16, 109:14.
expresses 99:4, 100:3.
expressing 108:19.
expressly 54:11, 59:2.
extending 95:8.
extensive 10:20, 26:15.
extent 10:23, 21:16, 21:18, 27:1, 33:4, 33:8, 33:22, 34:8, 50:25.
external 47:6.
extremely 40:2.
 .
 .
< F > .
F.3d 68:8.
F.sup.3d 68:12.
face 104:22, 110:14.
face--thoroughness 103:7.
fact 21:15, 21:25, 30:2, 31:6, 36:1, 37:10, 37:15, 43:11, 50:12, 72:18, 76:17, 98:16, 102:5, 108:5, 110:17, 111:11, 111:12, 111:17, 115:6.
Factor 20:25, 22:3, 22:4, 22:9, 22:11, 22:15, 22:17, 22:22.

Concordance

<p> factors 21:4, 22:22 . facts 67:9 . factual 7:1, 101:14, 111:23 . failed 29:4, 73:4 . fair 34:6, 83:16, 83:25, 85:6, 94:11 . fairly 10:19, 15:4, 35:23 . faith 15:10, 31:2 . faithfully 105:19 . fall 23:15, 88:6 . far 24:14, 79:10, 86:5 . fashion 72:7 . feature 22:1 . features 20:18, 22:14 . FEDERAL 8:25, 39:6, 48:19, 98:8, 102:18, 117:12 . feel 59:18 . FEES 117:4 . FERGUSON 2:14 . few 17:13, 49:17, 79:22 . Fifth 68:9 . figure 47:4, 48:9, 113:14 . figured 58:23 . figures 42:23 . Filbin 2:9, 3:16, 3:17, 75:13, 76:2, 76:16, 76:20, 77:2, 77:10, 77:18, 78:7, 78:16, 78:23, 79:4, 79:14, 79:20, 79:21, 80:1, 80:14, 86:19 . file 5:7, 15:12, 51:6, 112:20 . filed 20:22, 24:12, 26:25, 29:6, 29:12, 46:8, 48:23, 50:5, 51:5, 51:11, 51:12, 59:16, 66:11, 112:13 . files 39:19 . film 47:8 . final 12:8, 25:14, 27:8, 27:11, 29:2, 30:8, 30:9, 31:3, 32:3, 55:14, 64:4, 112:9, 114:18 . Finally 103:11 . find 4:17, 7:3, 44:13, 48:7, 74:12, 80:16, 80:17 . finder 31:6, 37:15 . finding 29:8, 31:18, 71:19, 108:9, 108:14 . finds 105:10, 106:2 . fine 5:23, 14:2, 26:12, 26:14, 84:24, 101:24 . firm 4:2, 28:5, 28:6, 100:25, 104:8, 106:22, 106:23 . </p>	<p> fitting 47:20 . fix 9:13 . flat 101:2 . FLOCK 2:13 . flow 105:9 . flying 115:1 . focus 102:16 . focused 13:9, 13:14 . focusing 98:19 . foiler 93:18 . follow 13:13 . following 90:11, 98:9, 112:20 . force 47:20, 49:4, 57:8 . force-fit 46:3, 47:6, 52:9, 52:13, 55:10, 57:1, 57:4, 57:5 . force-fit. 45:23 . force. 46:7, 46:25 . FOREGOING 117:1 . foreign 6:15 . form 91:2, 93:18 . formal 68:7 . formality 27:24 . formally 5:8 . FORMAT 77:12, 101:18, 117:5 . formed 31:1, 90:24 . forth 13:23, 14:23, 15:1, 35:25, 69:15, 71:11, 80:3, 80:4, 107:10 . forward 36:9 . forward--'the 51:21 . found 8:4, 29:3, 40:11, 40:17, 55:1, 55:4, 55:13, 70:10, 79:8, 79:9 . foundational 63:13 . four 8:18, 8:20, 35:20, 75:17 . frame 39:23 . Frankly 13:13, 32:6, 37:10 . free 104:25 . friction 47:5 . Friday 4:15, 113:22, 114:1, 114:17, 115:2, 115:6, 115:13, 115:16 . front 109:25 . full 53:10, 68:6 . fully 36:20, 63:15, 64:2, 91:22 . furnished 114:12 . . . < G > . gaining 39:22 . </p>	<p> game 83:25 . gap 21:10 . Gary 2:23, 3:23, 103:17 . gasket 84:9 . gather 112:15, 113:9 . gathering 115:3 . gave 56:7, 58:17, 67:13, 68:5 . general 74:8 . generally 24:13 . generically 91:15 . Geoff 3:22, 41:21, 92:19, 95:7, 97:25, 100:20, 102:10, 103:11, 109:22, 110:5 . GEOFFREY 2:37 . Georgia-pacific 20:14, 20:25, 21:4, 21:18, 22:3, 22:4, 22:22 . German 6:16 . Germany 115:2 . gets 110:21 . getting 23:19 . Gilstrap 4:13, 4:14, 4:23, 6:4, 6:10, 6:24, 8:17, 9:18, 15:20, 16:10 . gist 108:6 . give 9:16, 32:22, 42:8, 66:18, 74:1, 82:19, 92:22 . given 61:4, 83:21, 99:25 . gives 10:5, 24:21 . glad 26:3 . global 77:6 . GMBH 1:5 . Golden 104:23 . gotten 62:23, 107:15 . GP 22:15 . grant 24:25, 44:6, 65:6 . granted 31:16, 31:18 . granting 31:20, 34:3 . graphic 90:1, 91:19 . grappling 37:10 . Great 11:23, 19:9 . ground 13:22, 33:7 . grounds 73:21 . Group 72:8, 75:10 . guess 15:6, 42:16, 65:25, 66:1, 85:5, 86:7, 113:15, 113:23, 113:24 . guessing 113:17 . . . </p>
--	---	---

Concordance

< H > .	101:25, 102:8, 102:12,	improperly 84:21 .
H. 2:8 .	104:12, 105:4, 109:17,	improvements 20:19, 22:14 .
half 47:12, 53:25, 54:2, 113:5 .	109:25, 110:9, 110:23,	impute 70:22 .
hand 66:4 .	111:21 .	imputed 70:15 .
hand-in-glove 76:6 .	Horn--but 36:24 .	inadequate 13:19 .
handed 110:1 .	horrors 61:8 .	inadmissible 60:18, 98:7 .
happened 50:16, 51:2, 67:16 .	hour 15:23, 112:16 .	inappropriate 8:6, 99:5 .
happy 5:21, 6:7, 6:10, 11:15,	hours 5:17, 5:24 .	inclined 64:19 .
17:23, 18:9, 65:17 .	house 45:7, 45:8, 45:12, 45:13,	include 5:18, 25:3, 58:8, 78:12,
hardest 32:6 .	46:2, 46:4, 46:6, 57:5, 57:7 .	81:20, 83:3, 115:17, 115:18 .
HARTMANN 2:8, 3:7, 3:8, 5:23,	housing 40:22, 46:6, 51:21,	includes 15:15, 28:8, 93:18 .
5:25, 12:13, 12:21, 13:1, 13:6,	57:8, 89:9, 89:16, 90:21,	including 52:17, 56:3, 67:1,
13:8, 13:15, 14:4, 14:11,	91:14, 91:22, 93:22, 94:10,	68:16, 75:21, 78:19, 101:4,
87:15, 112:6, 113:15, 114:3,	94:13, 94:14, 95:14, 95:19,	108:11 .
114:8, 114:21, 115:1, 115:10 .	97:1, 97:10 .	income 21:2 .
hat 40:9, 40:17 .	housing"--clearly 95:12 .	inconsistent 45:4, 49:18, 49:23,
he'll 15:20 .	housing--"which 95:13 .	58:24 .
head 96:3, 114:24 .	housings 84:8, 84:9, 84:11 .	Incorporated--s-h-u-r-e 73:23 .
head-and-shoulders 11:4 .	HOUSTON 1:44, 2:40 .	incorporating 67:3 .
heads 17:16, 68:6 .	humans 40:4 .	incorrect 61:7 .
hear 5:22, 17:1, 17:9, 19:12,	hypothetical .	
20:7, 24:3, 32:22, 60:23,	.	
65:17, 66:1, 66:17, 68:1,	.	
82:18, 88:11, 109:13 .	< I > .	independent 108:16 .
heard 65:2, 94:7 .	idea 15:21, 62:4, 83:15, 83:17,	independently 22:21 .
hearing 116:5 .	83:23, 83:24, 84:1, 84:2,	indicate 64:5, 65:2 .
hearing. 116:9 .	84:11, 84:13, 84:21, 85:8 .	indicated 5:9, 12:17, 19:4, 21:5,
hearsay 60:18, 61:5, 63:21 .	identified 78:8 .	89:22, 96:20 .
heart 67:9 .	identifies 63:1 .	indicates 18:17, 90:18, 106:25 .
Heatherly 99:16, 99:21 .	identify 12:1, 89:21 .	indicating 90:2 .
heightened 23:10 .	identifying 10:13 .	indicators 21:2 .
Heli 80:8 .	Illinois 2:6, 2:27, 66:12, 67:14,	indiscriminately 62:18 .
helpful 9:8, 15:1, 66:7 .	67:16, 67:17 .	individual 85:12 .
HEREBY 77:18, 117:1 .	image 96:1 .	induce 75:21 .
high 19:16, 19:17, 28:7 .	imagine 15:3 .	inducement 75:20 .
highlighted 28:11, 50:22, 91:20,	immediate 95:3 .	inducing 67:7, 78:3 .
93:13, 93:23, 96:20 .	imminently 105:4, 109:9 .	indulgence 87:11 .
highly 40:2 .	impact 63:23 .	industry 40:1, 60:14, 60:22,
Higuchi 25:16, 25:23, 28:12,	impaneled 113:5 .	60:24, 61:13, 62:8, 62:15,
28:18, 29:7, 81:20, 82:14 .	impeachment 84:18, 85:1 .	62:17, 107:9 .
hiring 77:22 .	implausible 62:19 .	industry-wide 64:6 .
hold 46:6, 57:7, 108:1 .	importance 63:23 .	inferentially 62:22 .
holds 52:2, 76:3 .	important 27:14, 63:23, 92:22,	information 9:19, 9:25, 10:2,
HONORABLE 1:24 .	95:21 .	15:24, 16:8, 67:2, 67:12,
hope 12:7, 16:9 .	importing 91:5, 91:24, 92:13 .	68:15, 68:17, 68:25, 69:7,
hopefully 85:18 .	imports 92:3 .	69:25, 70:12, 70:14, 70:17,
horizontal 56:10 .	imposing 91:13 .	70:23, 71:11, 72:14, 74:18,
Horn 35:17, 41:5, 87:9, 95:24,	impression 23:4, 24:21 .	77:4 .
97:24, 98:2, 98:12, 99:4,	improper 43:17, 85:17, 88:23,	informed 67:10, 77:23 .
99:24, 100:15, 101:10,	92:4, 99:24 .	

Concordance

infringe 18:16, 20:12, 40:21, 77:25, 96:5 .	invalid 33:23, 34:20, 35:3, 36:2, 100:5 .	63:1, 77:21, 82:4, 91:25 .
infringed 19:19, 100:5, 110:19 .	invalidated 28:9 .	.
infringing 23:5, 29:16, 31:2 .	invalidity 5:3, 28:10, 33:7, 34:12, 34:13, 34:14, 34:17, 34:18, 34:22, 34:24, 35:6, 36:11, 36:12, 37:11, 38:22, 38:24, 81:19, 81:25, 85:17, 106:4 .	< J > .
inherency 54:13, 54:17 .	invented 85:11, 85:12 .	Jason 104:8 .
inherently 49:25, 54:15 .	invention 83:13, 83:16, 83:22 .	job 107:16 .
initial 31:6, 60:15, 88:15, 95:2 .	inventor 83:18 .	joint 112:15, 112:21 .
initially 40:16, 41:10, 89:17, 89:21 .	inventors 83:14 .	Judge 1:25, 4:13, 4:14, 4:22, 6:3, 6:10, 6:24, 8:17, 9:18, 15:20, 16:10 .
initiated 63:3 .	Investors 69:20 .	judged 98:25 .
innovations 19:22 .	invitation 62:16, 62:19, 63:1, 64:6 .	judging 98:22, 103:4 .
innovator 19:14, 19:21, 21:6, 21:16, 25:3 .	invited 63:24 .	judgment 51:13, 66:11, 67:13 .
inquiries 71:12 .	involve 107:11 .	JUDICIAL 67:11, 68:3, 68:7, 68:10, 68:18, 68:22, 69:4, 69:5, 69:7, 69:9, 69:13, 69:16, 70:1, 70:2, 70:24, 71:19, 102:3, 117:6 .
inserted 40:3 .	involved 73:25, 77:20, 78:7, 80:24, 110:12 .	jurisdiction 67:13 .
instances 90:7 .	involving 68:24 .	juror 115:14 .
institute 31:17, 53:8, 53:24 .	iphone 40:5 .	jurors 8:22, 9:25, 10:22, 11:10 .
institution 27:12, 29:8, 29:9, 29:14, 30:12, 30:13, 30:17, 31:4, 31:16, 31:19, 32:1, 34:3, 34:8, 53:6, 57:10, 101:20 .	ipods 40:4 .	justified 99:3 .
instructed 8:8 .	IPR 25:14, 28:19, 28:21, 28:22, 29:1, 29:2, 29:3, 29:5, 29:6, 29:15, 29:17, 31:20, 45:4, 45:17, 45:20, 46:17, 50:17, 50:21, 52:15, 58:24, 88:5, 100:8, 106:20, 106:24 .	Juzkow 48:6, 87:8, 88:14, 88:16, 88:20, 88:23, 89:1, 89:3, 90:6, 91:16, 92:7, 92:13, 92:22, 93:1, 93:4, 93:10, 93:25, 94:12, 95:23, 96:23 .
instruction 37:17 .	lprs 27:9, 29:12, 33:4, 33:8, 34:6, 49:20, 49:24, 51:20, 52:14, 61:19, 102:1 .	.
insulator 88:21 .	irradiation 90:25, 97:14 .	< K > .
intellectual 19:15, 20:21, 77:25, 78:17 .	irrelevant 33:17, 36:2, 61:15, 72:11, 73:1, 73:10, 74:25, 75:5, 80:15 .	keep 9:25, 27:6 .
intend 7:22, 19:18, 20:11, 30:24, 43:15, 66:20, 85:7, 103:13, 113:3 .	is--'held 56:18 .	keeping 12:5 .
intended 10:21, 19:2, 101:5 .	issuance 30:22 .	kept 8:2 .
intended--excuse 61:12 .	issued 28:5, 28:13, 33:21, 33:23, 106:25 .	key 54:4, 93:24, 102:19 .
intending 7:1, 18:23, 27:15, 67:15 .	issues 5:16, 12:5, 13:14, 14:7, 14:17, 15:6, 15:10, 16:5, 17:7, 19:18, 32:20, 33:20, 35:23, 65:17, 73:9, 87:7, 88:16, 88:17, 102:7, 103:19, 104:15, 114:13 .	kind 27:7, 39:17, 51:1, 83:20, 84:17 .
intends 14:8, 61:6 .	it--nor 80:14 .	Kline 19:4, 20:20, 23:22, 24:6, 24:7, 24:19 .
intent 10:15, 11:6, 16:25, 43:9 .	item 63:11, 86:8 .	knowledge 61:13, 61:17, 62:5, 62:24, 64:13, 64:21, 66:24, 67:6, 70:21, 70:22, 74:15, 98:16, 106:12 .
intention 63:15, 103:24 .	items 14:18, 81:23, 82:1, 82:9, 106:6 .	knowledgeable 64:3, 64:9 .
intentional 41:2 .	itself 21:14, 35:10, 35:20, 51:18, 63:1, 77:21, 82:4, 91:25 .	known 63:3, 81:23 .
inter 26:25, 27:2 .		knows 107:14 .
interest 87:24 .		Kobayashi 54:7 .
interested 74:18 .		Kosonic 78:8, 78:9, 78:13 .
interim 27:7, 27:9, 31:21, 32:3 .		.
internal 47:6, 79:7 .		.
interrupt 66:16, 86:20 .		< L > .
intrinsic 93:12 .		
introduce 18:23, 32:8, 33:4, 33:5, 33:8, 34:5, 35:9, 37:23, 72:1, 81:18, 104:25 .		
introduced 27:2 .		
introducing 97:13 .		
introduction 72:12 .		

Concordance

LA 68:8 .	lend 110:9 .	local 6:8, 114:23 .
lacking 98:15, 108:11 .	less 19:1, 23:13, 110:18 .	logistical 115:3 .
Lake 2:25, 4:2 .	letter 35:10, 111:18 .	long 13:21, 26:11, 86:22 .
language 7:3, 45:25, 46:7, 46:21, 46:25, 49:1, 49:20, 49:21, 51:20, 52:18, 58:4, 58:13, 89:12, 91:4, 91:25, 92:3, 94:20 .	letters 101:18, 111:24 .	longer 25:19, 38:24, 45:10, 47:12, 47:17, 54:2, 58:7, 88:19 .
largest 63:7 .	level 19:16, 19:17 .	Look 10:22, 18:21, 22:22, 35:23, 38:15, 40:23, 90:12, 91:10, 93:15, 94:21, 94:23, 96:8, 101:7, 103:3, 105:23, 108:7, 111:19, 113:25 .
Lasalle 2:26 .	Lexus 69:21, 74:4 .	looked 80:16 .
laser 89:8, 89:15, 89:23, 90:25, 91:4, 91:14, 91:19, 94:1, 94:9, 94:25, 96:6, 96:7, 97:14 .	LEYDIG 2:3 .	looking 5:16, 17:24, 33:8, 41:7, 76:9, 90:25, 103:7, 105:18, 107:19, 107:22 .
lasers 94:16 .	liable 74:5, 74:9 .	looks 104:22, 106:23 .
last 11:3, 12:16, 14:24, 17:21, 25:17, 65:24, 67:10, 86:7, 97:23, 103:11 .	license 42:9 .	lot 4:15 .
late 25:17, 84:6 .	light 51:24, 93:11, 100:13 .	Louisiana 68:13 .
later 9:10, 15:18, 15:21, 36:23, 48:6, 56:2, 60:17, 86:7, 106:23 .	likelihood 28:7, 31:23, 33:24, 114:17 .	love 24:13 .
latter 52:4, 52:11 .	likely 28:9, 31:18, 98:24 .	low 31:21, 36:6 .
law 4:2, 15:18, 18:17, 28:5, 28:6, 35:15, 35:18, 36:5, 42:3, 68:3, 69:14, 70:5, 70:7, 100:25, 104:8, 104:23, 106:22, 106:23, 107:20 .	likes 110:24 .	lower 21:1 .
lawsuit 30:18, 30:23, 63:7 .	Limine 6:21, 14:16, 17:8, 17:9, 17:19, 17:22, 18:2, 18:6, 18:8, 18:12, 19:23, 25:10, 41:23, 42:2, 42:14, 43:5, 44:6, 44:20, 44:25, 51:11, 65:7, 86:10 .	LTD 1:11 .
lawyer 98:14, 99:2, 111:13 .	Limine. 17:25 .	Lunch 86:24, 87:11, 87:18 .
lawyers 106:7 .	limit 109:3 .	.
laying 41:6, 84:17 .	limitation 89:7, 90:23, 91:13, 91:23, 93:13, 93:23, 95:8, 95:25 .	.
layperson 102:23 .	limitations 91:5, 92:3 .	< M > .
lead 3:3, 71:12, 76:10, 114:22 .	Limited 12:22, 66:13, 89:23, 111:16 .	M. 2:39 .
Leading 108:25 .	limiting 91:7 .	MAGISTRATE 1:25 .
learn 4:21 .	Lin 76:4 .	main 15:13 .
least 27:21, 31:24, 62:22, 64:12, 64:19, 96:13, 107:2, 107:18, 114:16 .	line 7:12, 8:14, 9:20, 27:4, 51:14, 92:1, 101:19, 110:12 .	maintain 98:7, 100:14 .
leave 17:19, 25:13, 42:7, 42:17, 84:22 .	linear 88:24, 89:14, 90:19, 91:12, 93:7, 93:21, 95:15, 97:8 .	maintained 43:12, 77:12 .
leaves 83:4 .	link 22:5 .	maintaining 32:16, 34:11, 36:11 .
leaving 26:6 .	linked 72:10 .	management 14:20, 15:10, 15:13, 17:7 .
left 86:21, 91:11, 91:15 .	links 78:19 .	manner 14:23, 14:25, 46:24, 77:11, 78:25 .
Legal 68:4, 98:10, 98:12, 98:14, 99:4, 99:7, 99:15, 99:21, 99:25, 100:16, 100:19, 101:2, 101:6, 101:7, 102:13, 102:25, 105:6, 108:17, 108:22, 108:23, 109:2, 110:10 .	list 17:18, 21:24, 25:9, 35:12, 86:8, 86:9, 104:5, 112:9, 112:10 .	manufacture 46:19 .
legitimate 6:18 .	listed 82:12, 104:5 .	manufacturer 62:9, 63:8, 80:10, 100:10, 100:12, 100:16, 100:18, 100:22, 100:24 .
	listen 40:4, 109:20 .	manufacturers 62:9, 63:3, 63:14, 70:20, 73:8, 73:14, 75:22, 76:22, 77:15, 78:18 .
	listening 109:20 .	manufacturing 20:17, 22:13, 107:13 .
	lists 82:4, 112:19 .	Marc 48:6, 88:14 .
	litigation 45:5, 45:10, 49:19, 50:1, 66:21, 67:9 .	March 30:15, 50:6 .
	little 36:23, 40:9, 50:19, 75:16, 86:21 .	marketplace 40:14 .
	live 24:14, 24:23, 60:10, 97:17, 104:5 .	MARSHALL 1:3, 1:12, 1:45,
	LLP 2:19, 2:25, 2:33 .	

Concordance

2:41 .
Martinez 68:8 .
matched 47:7 .
material 27:20 .
material. 93:19 .
MATTER 17:23, 60:16, 88:15,
 108:16, 111:1, 117:3 .
matters 37:23 .
Mayer 2:3, 2:19, 3:23 .
Mcroberts 1:43, 2:39, 117:9,
 117:11 .
me--if 61:12 .
me--in 90:11 .
me--the 29:4 .
me--varta 61:6 .
mean 31:18, 34:25, 48:16, 48:22,
 56:12, 58:1, 58:3, 58:17,
 80:23, 90:20, 93:23, 94:18,
 102:1, 109:18, 110:15, 111:1,
 115:13 .
meaning 27:6, 52:9, 56:2, 56:8,
 56:13, 56:15, 56:17, 56:18,
 57:14, 57:16, 57:17, 70:6,
 89:5, 89:20, 90:5, 90:15, 92:2,
 93:11 .
means 17:2, 48:10, 53:19, 55:25,
 56:5, 59:18, 95:13 .
meant 52:24, 56:1 .
mechanism 40:8, 40:17, 45:14,
 52:1, 54:10, 55:2, 55:11 .
meet 15:12, 15:15, 16:4, 16:6,
 17:3, 73:3, 91:3 .
meeting 60:14, 60:22, 60:24,
 61:11, 61:21, 62:16, 62:17,
 62:22, 63:12, 63:15, 63:24,
 64:21 .
members 7:20, 63:13 .
mention 16:16, 32:1, 45:10,
 89:15 .
mentioned 46:23, 82:5, 98:24,
 99:13, 103:20, 115:22 .
merely 92:2 .
merits 35:6, 35:13, 35:22, 50:15,
 55:9, 62:2 .
mesh 93:18 .
met 29:9, 48:6, 54:18, 90:24,
 95:25, 112:12 .
metal 93:18, 97:2 .
methods 54:11, 98:18 .
Metzdorff 20:14, 77:2, 78:8,

78:10, 79:6 .
Metzdorff--whether 22:12 .
MICHAEL 2:8 .
Microbattery 1:5, 3:3, 17:11 .
mid-2015 39:22 .
middle 40:18, 108:8 .
Miehlich 62:16, 62:21, 64:4 .
Miehlich--and 61:7 .
Mike 3:7 .
MIL 7:3, 7:9, 8:11, 25:1, 25:13,
 25:15, 26:20, 38:15, 38:17,
 38:19, 39:3, 43:9, 44:6, 45:3,
 59:24, 60:3, 60:6, 60:7, 60:10,
 60:13, 65:10, 65:11, 66:15,
 74:2, 81:10, 86:16, 88:7, 92:5,
 93:10, 102:3 .
Mils 8:7 .
mind 23:5, 32:7, 110:6 .
mindful 42:2 .
minds 19:10, 20:2, 26:3 .
minimum 29:17, 34:5, 37:5 .
minute 86:20 .
minutes 6:1, 6:2, 8:15 .
mischaracterizing 93:2 .
misimpression 18:16, 19:9 .
missed 80:14 .
mistaken 86:2 .
misunderstanding 19:9 .
modification 27:5, 107:25 .
modified 108:3, 108:5 .
modify 17:19, 25:13, 26:19,
 38:19, 41:22, 108:10 .
moment 12:16, 38:15, 50:10,
 77:3 .
Monday 112:18, 113:24 .
monitors 72:23 .
moot 33:7 .
morning 3:1, 3:6, 3:8, 3:9, 3:11,
 3:12, 3:14, 3:15, 3:17, 3:18,
 3:22, 3:25, 4:1, 4:4, 4:5, 4:7,
 4:8, 15:21, 44:21 .
mostly 74:18 .
Motions 5:15, 6:21, 14:15,
 14:16, 17:7, 17:8, 17:25,
 25:10, 26:8, 44:20, 44:25,
 51:13, 65:15, 86:22, 87:10,
 88:10, 112:2 .
motivation 108:10 .
movant 88:11 .
move 44:25, 115:16 .

moved 41:10, 115:16 .
moves 98:1 .
moving 4:14 .
Ms 9:9, 9:16 .
multiple 71:9, 71:10, 90:7 .
music 40:4 .
mutually 52:8, 55:11 .
mypower 63:9 .
myself 97:20 .
 .
 .
< N > .
N. 2:26 .
NA 76:5 .
name 11:5 .
named 83:18 .
namely 77:14 .
narrow 90:14 .
national 60:24 .
nationality 6:25, 7:9, 8:10 .
nationals 6:16 .
naturally 110:3 .
nature 20:2, 40:21, 101:19,
 103:8 .
near 46:5, 57:7 .
necessarily 22:5, 31:24,
 105:17 .
necessary 5:8, 21:16 .
need 6:9, 9:8, 10:25, 16:18,
 25:18, 26:12, 28:1, 32:19,
 33:4, 35:22, 40:13, 40:15,
 53:3, 53:7, 62:2, 68:10, 71:9,
 82:1, 86:14, 99:14, 112:8,
 112:14, 113:7, 113:9, 114:14,
 114:22, 115:25 .
needed 107:1 .
needs 15:17, 16:10, 17:1,
 72:19 .
negotiation 4:21, 22:7, 22:10 .
neither 61:18 .
new 50:12, 93:7 .
Next 38:9, 40:6, 41:4, 63:10,
 65:15, 71:24, 72:8, 86:8,
 86:19, 88:13, 93:14, 95:7,
 95:9, 99:9, 99:23, 100:20,
 102:10 .
nexus 24:10 .
night 25:17, 65:25, 67:10, 86:7 .
nobody 27:23, 28:1 .
non-final 32:9 .

Concordance

non-hearsay 71:17 .	objecting 94:8 .	omnibus 26:7 .
non-infringement 92:8, 93:5, 93:10, 95:4 .	objection 61:2, 61:5, 66:10, 71:14, 71:18, 72:5, 72:6, 72:9, 81:11, 84:19, 86:13, 86:14, 105:9 .	once 31:7, 37:5, 104:24 .
non-party 70:13 .	objections 14:8, 14:22, 15:16, 65:23, 66:15, 81:4, 81:6, 81:13, 87:20, 87:25, 112:21, 113:7, 113:9, 114:5, 114:7 .	ones 32:13 .
non-patented 20:17, 22:13 .	obtained 100:13, 104:4 .	ongoing 27:6, 30:23, 37:24 .
non-public 39:12 .	obtaining 42:7 .	opened 22:17, 22:19, 84:20, 85:20 .
None 5:22, 14:13, 52:4, 112:4, 112:6 .	obvious 108:18 .	opening 42:9, 43:3, 51:5 .
nonsensical 79:9 .	Obviously 6:3, 8:24, 10:8, 10:9, 12:22, 21:25, 23:3, 64:14, 64:23, 93:8 .	openings 5:19, 6:2, 44:11 .
noon 10:4 .	obviousness 29:18, 107:20, 108:9, 108:14 .	opine 99:12, 109:19 .
nor 61:19, 80:7 .	occasion 85:6 .	opined 20:15, 22:24 .
North 2:5, 72:22, 72:24, 73:22, 74:9, 74:10, 74:12, 74:21, 75:4, 79:13, 80:22 .	occur 79:2 .	opines 20:25, 28:7, 98:5 .
Northern 66:12, 67:14, 67:16, 67:17 .	occurred 61:12 .	opining 99:8, 108:6, 109:1, 109:10 .
Nos. 25:11 .	occurring 67:8 .	opinions--one 27:18 .
note 8:7, 25:1, 27:14, 27:25, 28:2, 31:25, 37:9, 72:6, 72:17, 79:15, 95:21, 96:21 .	occurs 37:14 .	oppose 70:7 .
notebook 10:7, 10:12, 10:21, 11:14 .	odds 106:21 .	Opposed 10:22, 17:25, 23:2, 79:7 .
notebooks 10:3, 10:4, 11:2, 11:3, 115:18 .	ODM 62:10, 67:2 .	opposes 41:22 .
noted 109:17 .	Odms 70:19 .	opposite 50:2 .
notes 11:8, 20:20, 101:5, 106:24 .	OEM 62:10 .	opposition 50:10, 99:10 .
Nothing 8:5, 96:5, 116:5 .	Oems 70:19 .	oral 112:3 .
notice 12:3, 15:17, 102:3, 104:4, 112:15, 112:21, 115:7 .	offer 23:15, 67:1, 72:21, 72:24, 73:2, 73:22, 73:25, 74:21, 74:23, 75:7, 80:25, 100:2, 101:6, 111:22, 112:2, 112:11, 113:3 .	orally 86:23 .
noticed 10:19 .	offered 55:6, 74:20, 113:8 .	order 4:23, 6:20, 8:7, 9:2, 9:18, 10:16, 10:19, 11:12, 11:24, 14:19, 14:21, 15:6, 27:23, 34:16, 42:5, 59:24, 74:5, 74:15, 94:13, 95:17, 96:5, 103:24 .
notices 5:2 .	offering 74:15, 75:3, 75:4 .	ordering 17:15 .
notified 5:7 .	offerings 79:10 .	ordinary 6:5, 57:14, 57:16, 70:4, 89:5, 89:20, 90:5, 90:15, 92:2, 94:18, 113:11 .
notify 112:14, 114:6, 115:25 .	offers 54:23, 76:18, 98:2, 100:7, 101:12, 101:17 .	organization 60:20 .
notion 79:16 .	offhand 30:14 .	organized 60:24 .
November 28:6 .	Office 27:12, 28:23, 29:3, 29:4, 29:8, 29:14, 30:3, 30:4, 30:5, 30:6, 31:8, 32:1, 33:6, 33:9, 37:2, 37:3, 37:6, 49:20, 49:24, 53:24, 54:5, 54:21, 55:1, 76:3, 76:6, 100:9, 108:4 .	original 89:22 .
Number 7:5, 23:16, 26:24, 31:16, 34:15, 59:13, 66:15, 77:1, 77:7, 78:10, 80:21, 83:1, 99:24 .	OFFICIAL 2:39, 56:4, 117:12 .	originally 40:7, 88:15 .
numbers 23:20, 82:12 .	often 83:23 .	originated 84:21, 85:7 .
numerous 20:22, 24:8, 24:9, 24:12 .	Okay 7:7, 18:1, 18:11, 26:2, 35:13, 66:19, 82:11, 82:13, 87:6, 95:1, 102:11, 115:10, 115:19 .	Ortho 102:18 .
numerously 46:15 .		others 19:15, 75:21, 78:16 .
nutshell 41:12 .		otherwise 61:20, 74:25 .
NW 2:20 .		ought 18:25, 19:10 .
.		outcome 29:15 .
.		output 96:3, 108:12 .
< O > .		outset 82:6 .
object 73:10, 73:20, 109:1 .		outside 79:7, 109:12 .
		overall 26:9 .
		overlapping 40:10, 40:20, 40:22 .
		overrule 71:18, 81:6 .
		overseas 67:2 .

Concordance

own 18:7, 18:15, 18:17, 19:7,
19:15, 19:22, 19:24, 20:12,
20:21, 21:8, 22:8, 23:6, 23:12,
39:20, 43:20, 43:21, 102:8 .
owns 19:14, 25:3 .
.
.
< P > .
p.m. 15:18 .
Page 11:9, 14:21, 17:15, 46:10,
46:14, 47:2, 47:19, 53:22,
59:17, 74:4, 79:14 .
pages 11:4 .
paid 111:13 .
paper 38:22 .
papers 5:9 .
paragraph 14:24, 15:1, 66:22,
67:23, 71:16, 90:13, 90:16,
90:18, 90:22, 90:25, 91:21,
95:5, 97:11, 97:14, 99:25,
100:6, 108:7, 108:8 .
paragraphs 23:22, 41:7, 88:25,
92:24, 94:23, 94:24, 97:6,
98:6 .
paraphrase 22:15 .
Part 7:18, 9:24, 26:7, 26:9, 41:3,
49:14, 52:16, 59:10, 63:2,
70:13, 70:23, 76:20, 78:11,
83:15, 91:16, 91:17, 91:20,
91:21, 93:12, 95:23, 97:17,
97:18, 97:21, 98:4, 110:25 .
partes 26:25, 27:2 .
partial 22:23 .
partially 12:13 .
participants 62:18 .
participated 64:22, 65:3 .
participating 64:10 .
particular 11:11, 12:19, 19:24,
23:2, 23:10, 29:2, 47:11,
47:15, 47:17, 47:18, 49:13,
53:19, 54:1, 57:17, 58:5, 58:6,
58:8, 58:12, 58:14, 72:18,
73:8, 79:6, 84:1, 85:16, 89:12,
98:12, 98:14, 103:9 .
particularly 66:22, 76:8, 76:12 .
parties 8:8, 8:15, 9:7, 11:1, 14:1,
14:9, 15:7, 17:3, 26:8, 38:12,
39:4, 43:25, 60:8, 68:24,
71:10, 77:14, 78:7, 86:23,
89:4, 92:6 .

Partners 68:12 .
Partnership 66:13, 66:14, 69:1,
69:2, 70:18, 71:6 .
Partnership--that 70:15 .
parts 54:1, 54:2, 88:14 .
party 7:9, 7:13, 7:24, 22:7, 22:12,
34:14, 41:23, 42:5, 42:6,
59:20, 69:14, 71:1, 78:1,
79:1 .
pass 89:8, 90:21, 91:22, 95:11,
95:12, 95:18, 96:25 .
passing 89:16, 91:14, 97:10 .
past 16:22, 17:14 .
patentee 104:25 .
patents-in-suit 28:8, 45:9 .
paths 47:12 .
Patton 2:32 .
Paul 2:9, 3:16, 75:13 .
Pause 87:3 .
pay 19:1 .
PAYNE 1:24 .
PC 2:13 .
people 76:22 .
per 5:17, 6:1, 8:18, 34:17 .
percent 62:13 .
peremptories 8:21 .
peremptory 8:18 .
perfectly 101:24 .
perhaps 37:16, 105:23, 114:9 .
period 30:15 .
permit 34:7, 92:25 .
permitted 25:5, 38:25 .
person 71:1, 90:8, 94:18, 99:2,
100:2, 106:14, 106:15,
106:17, 107:1, 107:3, 107:7,
109:11 .
perspective 103:3 .
Peter 2:29, 4:6 .
petition 31:20, 46:17 .
petitioner 31:23, 33:25 .
petitioner"--eve-- 54:22 .
petitions 32:12, 54:17 .
Ph 99:6 .
Pharma 55:16 .
Pharmaceuticals 102:18 .
photograph 63:12 .
phrase 57:25 .
pick 10:1 .
picks 110:3 .
picture 11:5, 11:9, 47:8 .

piece 103:9 .
pieces 57:18, 57:19, 58:7, 97:2 .
pierce 74:6, 74:12 .
place 29:20, 29:21, 44:21, 51:4 .
plain 57:14, 57:15, 89:5, 89:19,
90:4, 90:15, 92:2 .
plainly 108:11 .
Plaintiffs 2:3, 83:23, 84:20 .
plan 114:19, 114:23 .
play 18:8 .
PLAZA 2:4 .
pleading 69:25, 74:11 .
pleadings 69:15, 70:9 .
Please 3:1, 18:21, 41:19, 44:24,
45:6, 45:19, 46:10, 46:14,
47:2, 47:19, 87:19, 92:19,
93:14, 95:7, 95:9, 97:25, 99:9,
99:23, 110:6 .
pleasure 65:20 .
pled 67:12 .
point 5:22, 7:16, 12:12, 30:18,
31:15, 37:9, 50:4, 52:23,
55:14, 73:4, 75:19, 79:14,
83:21, 102:11, 102:21, 103:1,
111:3, 111:5, 113:12 .
points 36:19, 49:17, 66:17 .
Pontchartrain 68:12 .
popularity 39:22 .
popularized 39:25 .
portfolio 18:24, 19:24, 21:7,
23:12, 40:12, 61:14, 63:16,
64:8 .
portion 54:21, 72:15, 93:23,
96:19, 98:1 .
portions 52:15, 113:8 .
POSITA 90:18 .
positions 49:23, 99:7, 110:11 .
positive 103:19 .
possession 43:24 .
possibility 114:20 .
possible 46:18 .
possibly 12:14, 81:16 .
post-complaint 30:23 .
post-trial 10:24 .
potential 7:20, 72:23 .
practice 6:5, 6:7, 15:20, 42:13 .
practices 6:10 .
practicing 23:6, 24:21 .
pre-admit 84:23 .
pre-admitted 112:11 .

Concordance

precise 6:15, 7:3, 89:2.	79:10, 79:15.	properly 25:6.
preclude 18:7, 27:8.	prices 79:6.	property 19:15, 20:22, 77:25, 78:17.
precludes 92:6.	primarily 99:1, 110:13.	proposal 90:4.
precluding 41:23.	primary 28:16.	propose 19:18, 67:21, 108:3.
preclusion 42:5.	principles 98:18.	proposed 15:4, 17:14, 27:5, 45:12, 50:17, 51:18, 55:19, 89:22.
predicate 84:17.	prior 28:20, 33:5, 47:22, 52:22, 54:6, 81:18, 82:2, 82:9, 83:9, 84:6, 93:9, 103:9, 105:7, 105:19, 106:3, 106:6, 107:21.	proposing 35:9.
prefer 87:9.	privilege 104:24.	proposition 54:23, 74:8.
preferably 52:19, 91:18.	probably 9:10, 44:20, 113:16.	proprietary 20:21.
preference 38:3, 38:11, 87:12.	probative 19:7, 78:2.	protected 72:19.
preferenced 79:9.	problem 7:13, 9:12, 18:14, 19:1, 54:16, 112:23, 115:9.	protective 27:23.
preferred 46:24, 52:12, 52:14, 89:5, 90:17, 92:9, 92:13.	problematic 20:1, 32:14, 37:14.	proven 110:19.
prejudice 61:2, 110:21.	problems 8:2, 14:9, 16:22, 30:25, 40:11.	provide 9:9, 9:20, 46:1, 54:17, 58:19.
prejudices 7:20.	procedure 42:13.	provided 12:3, 15:25, 16:8, 17:4, 20:19, 21:24, 78:13, 90:2, 93:17, 100:25.
prejudicial 20:2, 43:3, 43:19, 44:3, 64:15, 70:16, 70:22, 71:13, 72:12, 110:7, 110:8.	proceed 3:20, 4:9, 9:4, 113:13.	provides 8:19, 101:11.
preliminary 45:21, 45:24, 46:8, 46:17, 46:22, 47:1, 48:22, 49:17, 50:24, 56:4, 56:7.	proceeded 35:3, 52:19.	provision 15:15.
prepared 12:2, 114:12.	proceeding 45:5, 45:18, 50:20, 56:2, 56:3, 56:21, 58:19, 58:24, 58:25, 70:24.	prudent 9:11.
preparing 114:11.	PROCEEDINGS 27:2, 27:6, 27:7, 27:10, 28:19, 28:21, 28:22, 29:15, 32:19, 37:24, 50:17, 50:21, 63:2, 117:3.	PRUDENTIAL 2:4.
PRESCRIBED 117:5.	proceedings. 87:3.	PTAB 30:8, 32:7, 33:16, 33:23, 37:23, 47:9, 47:14, 47:20, 48:13, 49:11, 49:12, 52:23, 53:2, 53:9, 53:22, 55:13, 56:3, 56:11, 56:20, 57:10, 57:14, 58:4, 58:19, 58:25, 59:2, 59:5, 59:7, 59:17, 101:19.
present 19:18, 42:19, 42:21, 44:10, 47:13, 57:16, 57:18, 58:7, 59:12, 67:15, 78:20, 83:22, 95:8, 102:7, 103:16, 103:21, 114:22.	process 7:19, 7:22, 9:23, 15:16, 15:17, 16:7, 28:10, 40:23, 50:14, 54:24, 90:10, 107:14, 114:11.	PTX 66:2, 66:10, 66:11, 72:5, 72:8, 72:9, 72:13, 72:21, 73:5, 73:7, 73:14, 73:18, 73:22, 75:25, 76:9, 76:17, 76:18, 77:3, 77:8, 77:10, 77:16, 78:23, 79:15, 79:25, 80:5, 81:6, 81:7, 81:11.
present. 54:3.	processes 20:18, 22:13, 107:13.	pull 20:10.
presentation 95:22, 97:4.	produce 72:2.	purchaser 73:19.
presentations 113:18.	produced 47:4, 62:20, 76:14, 77:4, 77:11, 80:19, 80:20, 80:21, 84:6, 100:1.	purchases 78:9.
presented 14:23, 16:18, 16:19, 16:21, 29:19, 51:15, 54:6, 54:19, 58:21, 95:24.	product 20:16, 22:18, 35:4, 36:9, 39:9, 39:11, 39:13, 40:16, 41:1, 41:9, 43:8, 43:13, 43:14, 92:8.	purchasing 70:19.
presenting 5:20.	production 18:3.	purpose 7:19, 33:11, 35:21, 64:7, 67:18.
presently 14:11.	prohibits 50:2.	purposes 10:24, 50:23, 92:7.
presents 83:14, 102:8.	project 77:21.	pursue 109:6.
press 60:19.	promise 9:24, 113:20.	pursuing 107:4.
pressure 46:5, 57:6.	promote 76:7, 79:18.	put 18:13, 25:18, 26:12, 32:4, 42:11, 42:24, 42:25, 43:23, 44:11, 45:12, 51:18, 73:13, 83:19, 83:24, 84:10, 89:10,
presumably 88:6, 110:23, 111:11.	promptly 115:25.	
PRETRIAL 1:22, 3:2, 10:19, 11:24, 14:19, 14:21, 15:6, 34:16, 42:18.	pronunciation--testify 61:8.	
pretty 22:15, 51:20.	proper 7:23, 10:6, 102:16.	
prevail 31:23, 33:25.		
prevent 43:16.		
previous 100:11.		
previously 81:8, 106:25.		
price 74:18, 74:25, 75:2, 79:5,		

Concordance

89:11, 94:22 .	ready 3:19, 4:9, 87:20 .	referring 25:23, 29:24 .
putting 44:12 .	real 11:10, 105:9 .	refers 14:21, 109:15 .
pyramid 63:13 .	really 31:14, 36:2, 39:5, 45:2,	reflected 89:25 .
Pytlik 81:21, 82:15 .	45:3, 55:25, 80:15, 93:2, 97:5,	reflects--would 96:23 .
.	98:9, 101:11, 109:1, 110:16 .	refusing 59:9 .
.	reason 9:1, 13:8, 13:10, 28:19,	regard 6:8, 6:18, 29:11, 95:20 .
< Q > .	42:12, 43:4, 54:5, 61:3, 75:5,	regarding 15:13, 18:3, 18:12,
qualifications 109:19 .	108:10 .	45:25, 46:12, 72:22, 88:7 .
qualified 100:15, 105:4, 109:9 .	reasonable 13:21, 18:23, 19:1,	regular 63:18, 68:20 .
qualify 68:18, 69:14, 70:6 .	26:3, 29:22, 31:7, 31:22,	reiterate 55:9 .
question 5:1, 6:19, 19:8, 35:23,	33:24, 36:8, 98:11, 99:12,	relate 24:17 .
38:8, 64:2, 75:18, 98:10,	99:19, 100:12, 100:18,	related 14:20, 45:3, 73:6, 88:18,
100:10, 102:17, 105:17,	106:15, 106:16, 106:25,	88:20 .
106:21, 107:3, 112:18, 113:12,	107:6, 109:10 .	relates 21:18, 81:17, 82:9 .
114:21 .	reasonableness 37:15, 98:10,	relating 20:24, 23:17, 24:13,
questionnaire 9:8, 9:14 .	99:15, 99:18, 100:11, 105:8 .	24:24, 25:4, 28:21, 81:23,
questionnaires 9:6, 115:14,	reasonably 98:3, 100:3, 100:22,	82:23, 90:23 .
115:17 .	100:24, 103:2, 103:6 .	relationship 21:19 .
questions 6:6, 6:9, 6:14, 9:17,	reasons 20:13, 21:4, 69:6, 98:9 .	relatively 36:6 .
9:20, 11:15, 17:6, 37:19,	rebuttal 48:3, 83:16, 89:1 .	release 60:19 .
44:15, 81:1, 92:15, 106:17 .	received 64:16, 98:4 .	relevance 42:3, 73:16, 73:19,
quick 36:18, 62:3, 97:5 .	recent 5:2, 50:6 .	73:20, 76:1, 78:5, 78:15, 81:3,
quickly 29:11, 39:18, 62:25,	recently 4:14, 39:10, 59:20 .	83:8, 83:10, 84:4, 84:5 .
102:11 .	recess 44:21, 44:22, 87:17 .	reliance 29:20, 29:22, 31:7, 31:8,
quite 17:13 .	recess. 44:23, 87:18 .	35:4, 39:16, 43:13, 98:6,
quotation 79:5 .	recognize 96:10 .	98:11, 99:12, 100:23, 101:22,
quote 45:21, 46:1, 46:23, 59:8,	recollection 11:11 .	102:6, 103:22, 103:25 .
59:9, 79:15 .	recommend 96:13 .	relied 98:3, 100:3, 100:22, 103:2,
quoted 59:17, 79:7 .	reconsidering 64:25 .	106:4 .
quotes 86:1 .	RECORD 3:2, 3:5, 25:19, 26:13,	relief 72:18 .
.	27:22, 79:5, 100:14, 117:2 .	relieve 44:4 .
.	records 79:8 .	rely 27:15, 36:8, 52:14, 56:13,
< R > .	red 27:4, 53:15 .	76:24, 100:4, 100:24, 103:6,
radial 46:4, 57:6 .	redact 71:16 .	109:11 .
radii 47:6 .	redesigned 25:22 .	relying 22:17, 29:7, 36:12, 37:11,
raise 33:19, 33:20, 51:7 .	reducing 82:25 .	54:13, 78:6, 90:13, 91:16,
raised 8:8, 37:9, 50:13, 51:8,	refer 25:22, 30:1, 39:1, 41:15,	99:3, 100:11, 110:1 .
51:10, 81:4, 114:14 .	44:13, 66:5, 66:20, 76:10,	remainder 9:5 .
RAMEY 2:13 .	77:15, 78:16 .	remaining 8:23, 87:6 .
rate 21:1 .	reference 5:2, 6:15, 6:18, 7:8,	remains 88:22 .
rather 48:9, 65:16, 93:10 .	7:12, 17:20, 18:12, 18:14,	remember 22:10 .
reach 14:2, 35:24, 109:4 .	25:14, 27:10, 28:11, 54:7,	remind 22:9 .
reached 49:12, 60:8 .	54:9, 81:20, 106:2, 107:23 .	removed 68:23 .
reacted 106:16 .	referenced 70:20 .	rendered 34:20, 35:2, 36:3, 37:7,
reaction 95:3 .	references 7:2, 8:9, 28:16,	106:22 .
read 22:4, 51:24, 92:22, 94:3,	28:20, 29:10, 29:13, 30:2,	rendering 106:8 .
106:13 .	30:4, 30:6, 54:12, 54:14,	renders 108:17 .
reading 10:23, 16:16, 89:5,	54:19, 55:2, 106:3, 106:7,	repeat 82:11 .
89:7 .	106:13, 107:25, 108:10 .	repeated 7:10 .
reads 45:21 .	referred 80:14 .	repeating 80:22 .

Concordance

<p>replicate 39:8 .</p> <p>replicating 39:11 .</p> <p>report 23:22, 24:6, 48:4, 59:16, 88:25, 89:1, 89:3, 90:12, 92:23, 94:15, 94:20, 95:23, 96:9, 96:13, 96:14, 96:23, 98:2, 104:12, 107:10 .</p> <p>REPORTER 2:39, 117:12 .</p> <p>reports 51:12 .</p> <p>representation 78:25, 82:22, 83:2 .</p> <p>representative 12:19, 19:13, 76:5, 78:14, 104:1 .</p> <p>representatives 13:17 .</p> <p>represented 91:19 .</p> <p>reproduced 47:4 .</p> <p>request 13:21, 17:18, 21:24, 25:13, 26:19, 38:19, 41:14, 41:22, 72:15, 72:17, 89:25, 90:3 .</p> <p>requested 28:2 .</p> <p>require 10:3, 22:5, 48:14, 68:7 .</p> <p>required 44:9, 98:16, 114:23 .</p> <p>requirement. 108:12 .</p> <p>requirements 108:14, 108:22, 108:23, 109:2 .</p> <p>requires 11:15, 23:1, 31:22, 35:5, 39:7, 39:14, 94:9, 108:9 .</p> <p>requiring 97:14 .</p> <p>reservation 34:16 .</p> <p>reserve 12:14, 34:18, 64:19, 84:25 .</p> <p>reshaping 113:18 .</p> <p>resistance 90:9, 91:1 .</p> <p>resistive 90:10 .</p> <p>resolution 25:19, 25:21, 86:10 .</p> <p>resolve 16:4, 109:7, 112:16, 114:7 .</p> <p>resolved 14:10, 15:16, 15:22, 16:23, 18:3, 25:16, 50:11, 71:24, 81:10, 112:14, 113:10, 114:5 .</p> <p>resolves 86:10 .</p> <p>respect 18:20, 27:5, 27:9, 30:20, 31:23, 38:21, 101:1, 107:4, 107:17, 108:12 .</p> <p>respects 19:15 .</p> <p>respond 32:23, 66:18, 82:19 .</p> <p>response 20:7, 20:20, 22:23,</p>	<p>45:21, 45:24, 46:17, 50:24, 56:4, 56:7, 58:20, 68:1, 82:18, 92:10 .</p> <p>responses 46:8, 46:22, 47:1, 48:22, 52:15 .</p> <p>responsibility 85:24 .</p> <p>responsible 107:16 .</p> <p>rest 101:8 .</p> <p>result 20:25, 50:25 .</p> <p>resulted 49:25, 54:15 .</p> <p>results 16:24 .</p> <p>resume 87:20 .</p> <p>retail 99:19 .</p> <p>returned 9:23 .</p> <p>review 27:2, 96:13 .</p> <p>reviewing 8:6, 100:1 .</p> <p>reviews 26:25 .</p> <p>revisit 64:24 .</p> <p>right-hand 39:21, 40:19 .</p> <p>rights 77:25 .</p> <p>Rimon 28:5, 28:6, 28:10, 100:21, 104:8, 106:22 .</p> <p>ripe 65:1 .</p> <p>rise 67:13, 74:1, 88:6 .</p> <p>risk 61:1 .</p> <p>risks 20:18, 22:14 .</p> <p>RMR 1:43, 2:39, 117:11 .</p> <p>ROBERT 2:10 .</p> <p>rocket 39:24 .</p> <p>routinely 11:12, 19:12 .</p> <p>ROY 1:24 .</p> <p>royalty 18:23, 19:1, 21:1 .</p> <p>Rule 69:11, 92:21, 98:8, 101:3, 101:4, 101:5, 102:2, 102:15, 114:23 .</p> <p>rules 13:23 .</p> <p>ruling 64:19, 64:24, 85:2 .</p> <p>.</p> <p>.</p> <p>< S > .</p> <p>S. 1:24 .</p> <p>S/shawn 117:9 .</p> <p>safest 114:8 .</p> <p>safety-type 99:20 .</p> <p>sale 67:1, 72:21, 72:24, 73:2, 73:25, 74:23, 75:7, 80:25 .</p> <p>sales 71:25, 72:1, 72:2, 72:3, 74:5, 74:9, 76:3, 76:6, 77:4, 77:6, 78:12 .</p> <p>Samsung 61:18, 63:8 .</p>	<p>satellite 66:21 .</p> <p>satisfaction 12:11 .</p> <p>satisfied 108:24 .</p> <p>sausage 15:3 .</p> <p>saw 5:2, 42:23, 95:2 .</p> <p>saying 12:18, 22:3, 22:17, 22:20, 24:7, 24:8, 24:10, 33:24, 35:1, 36:10, 47:16, 48:19, 49:2, 56:24, 57:3, 59:11, 70:5, 71:20, 74:24, 76:18, 92:21, 105:24 .</p> <p>says 14:22, 23:24, 46:18, 49:21, 52:7, 68:16, 70:7, 70:25, 83:13, 94:15, 95:6, 95:12, 96:1, 96:5, 101:21, 103:9, 104:24 .</p> <p>scheduled 115:7 .</p> <p>schematically 91:18 .</p> <p>scope 51:2, 56:22 .</p> <p>screen 23:23 .</p> <p>se 34:17 .</p> <p>seal 84:12 .</p> <p>seal. 47:8 .</p> <p>search 77:20 .</p> <p>seated 3:1, 44:24, 87:19 .</p> <p>second 28:13, 28:17, 29:6, 30:11, 38:2, 54:7, 56:7, 79:1, 80:5, 86:3, 87:1, 91:21 .</p> <p>Section 11:3, 14:25, 88:18, 88:20, 93:18, 93:20, 95:13, 96:13, 98:6, 101:8, 104:12, 109:15 .</p> <p>sections 92:23 .</p> <p>seek 4:17, 64:23, 72:18, 81:18, 84:22 .</p> <p>seeking 19:16, 19:22, 20:3, 31:10, 37:23, 67:14, 67:22, 71:3, 93:7 .</p> <p>seeks 60:13, 92:23 .</p> <p>seems 5:16, 6:18, 32:14, 33:17, 70:5, 80:15, 109:11 .</p> <p>seen 34:11, 43:6, 61:9, 64:6, 82:24 .</p> <p>seize 47:23 .</p> <p>selected 113:4, 115:13 .</p> <p>selection 4:13, 5:19, 9:15, 9:22, 10:6, 114:17, 114:24, 115:7, 115:15 .</p> <p>selections 4:15 .</p> <p>sell 25:23, 35:4, 62:9, 67:1, 67:3,</p>
---	--	--

Concordance

67:4, 76:7, 76:11, 76:19,
79:19, 80:10 .
seller 77:18, 77:19, 77:23,
77:24 .
sells 62:12 .
sense 16:12, 16:13, 48:4, 57:14 .
sensitive 6:17, 29:24 .
sent 62:18, 65:24 .
sentence 53:14, 53:15, 97:11 .
sentences 49:5 .
separate 59:22, 79:17 .
separating 10:13 .
September 4:13, 9:15, 28:15,
113:23, 113:25, 114:2,
114:18 .
sequence 17:13 .
series 77:12 .
serious 29:19, 37:6, 37:7 .
seriously 100:10 .
serve 82:2 .
served 50:8 .
set 4:12, 10:3, 11:4, 13:14,
14:23, 14:25, 15:11, 42:13,
80:3, 80:4, 107:10 .
sets 36:5 .
settled 61:19, 69:2 .
settlement 4:21 .
several 28:7, 48:25, 75:17, 77:4,
77:12, 88:16, 107:15, 115:22 .
shall 13:11, 14:22 .
Shallow 68:11 .
shape 10:6 .
SHAWN 1:43, 2:39, 117:11 .
shawn_mcroberts@txed.uscou
rts.gov 1:47 .
sheet 76:10 .
shell 40:3 .
Shen 2:30, 4:3 .
ship 39:24 .
Shire 55:15 .
short 16:2 .
shot 11:4 .
shouldn't 31:11, 42:18, 69:5,
109:13 .
show 12:16, 12:23, 13:2, 13:3,
13:4, 21:17, 24:5, 33:5, 42:25,
43:22, 46:21, 46:25, 47:8,
48:12, 61:13, 61:16, 63:16,
64:1, 67:18, 74:15, 75:6,
76:19, 76:25, 83:17, 84:6,

84:15, 105:21, 114:11 .
showed 47:3, 54:8 .
showing 10:16, 13:5, 39:20 .
shown 30:10, 39:20, 40:18,
44:10, 53:14, 54:11, 81:3,
81:8, 90:13, 104:23 .
shows 21:15, 42:22, 62:24,
90:1 .
Shure 73:23 .
side 5:17, 5:20, 5:21, 6:1, 6:6,
8:4, 8:18, 8:19, 8:21, 14:8,
14:19, 16:2, 16:8, 20:14,
39:21, 40:19, 56:10, 66:18,
85:18, 112:9, 112:10, 112:11,
114:5, 116:1 .
side-by-side 10:17 .
sides 6:8, 8:10, 9:2, 26:12, 34:7,
40:10, 40:20, 40:22 .
sideshow 33:17 .
significant 15:5, 20:18, 22:14,
40:11, 42:22 .
signing 77:19 .
similar 53:23, 78:17, 78:25,
84:5 .
Similarly 28:15, 46:9, 46:11,
73:18 .
Simmons 102:20 .
simplified 50:19 .
simply 10:16, 21:6, 24:7, 24:12,
31:22, 51:14, 67:18, 70:4,
74:9, 80:2, 80:22, 96:21 .
simultaneous 8:19 .
single-sided 10:12 .
sitting 109:25 .
situation 36:15 .
six 9:1, 46:14 .
sizable 18:24, 21:7 .
skill 90:8, 94:18 .
skilled 106:14 .
slow 16:11 .
small 40:2, 40:17 .
Smith 102:19 .
sold 62:11, 66:24, 72:24, 77:1,
77:7, 84:14 .
somehow 79:17 .
someone 64:21, 84:1 .
sometimes 16:24 .
somewhat 37:14 .
somewhere 84:2 .
soon 4:24, 4:25, 69:2, 115:21 .

sooner 115:14 .
sorry 94:23, 110:5 .
sorry--9 83:7 .
sort 27:3, 27:4, 27:12 .
sources 101:12 .
specialized 98:15 .
specific 21:23, 23:19, 37:13,
39:8, 49:1, 61:10, 61:17,
106:1, 106:6 .
specifically 32:1, 51:3, 63:17,
88:25, 89:6, 90:25, 97:6 .
specification 49:7, 52:4, 52:5,
52:7, 52:11, 52:12, 89:6,
90:14, 90:17, 91:6, 91:8,
91:10, 91:17, 92:9, 94:17 .
specifications 20:16 .
spectrum 23:14 .
split 32:10 .
sponsoring 61:5, 80:24 .
spot 88:23, 90:10, 91:3, 93:6,
95:14, 96:2, 96:25, 97:12 .
spot-like 91:12 .
spot-welded 89:14, 90:19,
93:21, 97:7 .
spots 90:21, 90:23, 95:11, 97:10,
97:13 .
spring-load 45:15, 46:11, 48:25,
57:20, 58:9, 59:14 .
spring-loaded 52:1, 54:10 .
ST. 2:14, 2:26 .
stage 64:25 .
stamp 96:2 .
stand 4:25, 37:13, 42:9, 71:13,
109:25 .
standard 8:14, 26:20, 29:9,
31:21, 42:13, 80:23, 98:22,
110:20 .
standing 6:20, 7:3, 9:18, 39:3,
41:22, 42:5, 44:6, 66:15 .
standpoint 105:18, 105:20,
106:14, 107:22, 108:1 .
stands 74:8 .
start 15:24, 17:8, 17:23, 42:9,
44:1, 45:6, 48:4, 65:25, 75:25,
89:10, 92:20 .
starting 16:4 .
starts 95:8, 110:21 .
state 3:5, 71:13 .
stated 24:7, 69:24, 70:23 .
statement 16:2, 53:21, 53:23,

Concordance

54:6, 56:22, 67:23, 68:23,
69:13, 69:25, 70:11, 70:16,
70:23, 71:1, 71:2, 71:3, 71:5 .
statements 33:10, 50:23, 51:1,
68:17, 69:6, 69:15, 70:8,
111:23 .
statements--the 100:21 .
STATES 1:1, 1:25, 62:7, 62:14,
64:12, 66:25, 67:5, 67:8,
67:20, 74:16, 75:23, 76:8,
76:12, 76:21, 78:1, 78:4,
78:11, 78:21, 79:2, 80:12,
80:15, 108:8, 117:7 .
States--in 78:19 .
static 57:8 .
static-friction 46:7, 46:25, 49:4,
56:10 .
status 12:6 .
stay 53:20 .
stayed 50:7, 86:7 .
stealing 44:2 .
step 62:3, 99:19 .
stereo 39:25 .
STETSON 2:5 .
STINSON 2:17, 3:6, 3:7, 3:10,
3:13, 3:16, 3:19, 3:21, 11:17,
11:19, 65:24, 66:8, 66:9,
112:22, 114:24, 115:8, 116:3 .
stipulation 10:25, 17:5 .
stipulations 10:20, 10:23, 10:24,
14:20, 15:12, 16:16 .
stopped 41:8 .
store 99:19 .
story 83:22 .
straight 51:20 .
STREET 1:44, 2:20, 2:40 .
strike 88:13, 88:16 .
strikes 8:18, 8:20, 64:15 .
stronger 65:2 .
subject 7:25, 30:2, 51:19, 71:2,
81:17, 89:4, 89:19 .
subjective 29:16 .
submit 9:12, 19:6, 24:14, 38:25,
40:25, 41:12, 55:17, 62:18,
62:22, 62:23, 105:1, 106:11,
106:20 .
submitted 28:21, 30:3, 38:22,
89:24 .
subsequent 106:18 .
Subsequently 29:6 .

subsidiary 74:1, 74:6, 74:10 .
substitute 43:10 .
suffer 110:21 .
sufficient 5:17, 5:21, 31:1,
40:25, 41:13, 47:5 .
sufficiently 75:7, 80:11 .
suggest 15:7, 34:21, 63:10 .
suggesting 30:1, 32:11, 32:18 .
suggestion 42:15, 104:21 .
suit 29:2 .
SUITE 2:5, 2:14, 2:26 .
summarized 27:13, 52:16,
89:20 .
summarizing 41:6 .
summary 51:13, 52:16, 52:20,
71:25, 72:1, 72:2, 77:5 .
Sunrise 60:20, 60:21 .
superiority 20:15 .
supplemental 45:2, 59:22,
59:25 .
supplied 70:14, 77:23 .
supply 78:20 .
support 21:1, 52:10, 55:5, 55:19,
91:24, 96:24, 110:10 .
supports 64:24 .
supposed 107:24 .
Surely 111:3, 111:4 .
surrounding 34:9 .
survived 30:5 .
suspected 102:22 .
sustain 84:19, 86:14 .
sustained 81:12, 86:13 .
switch 24:5, 48:5, 62:1 .
.
.
< T > .
table 10:16, 22:8, 38:23 .
tabs 10:13 .
talked 25:10, 40:14, 52:16,
60:16, 83:12, 86:9, 106:3,
108:25 .
talks 91:17, 91:22, 94:16, 96:4,
97:11, 100:8, 101:19, 106:8,
106:19 .
tangential 102:12 .
tangentially 101:13 .
target 62:21 .
targeting 63:5, 63:17 .
task 100:1 .
teach 107:23 .

teaches 107:23 .
teaching 47:21 .
technically 106:10 .
technologies 106:13 .
technology 22:8, 109:9, 109:14,
109:19 .
tells 91:6 .
tend 64:1 .
term--'held 53:10 .
terms 12:6, 13:22, 15:10, 16:6,
19:1, 20:1, 32:14, 33:3, 36:1,
44:1, 44:5, 69:15, 80:23, 86:2,
94:19, 103:18 .
territory 44:2 .
test 34:1 .
testify 25:5, 103:22 .
testifying 25:2, 102:6 .
testimony 11:8, 11:11, 13:13,
18:7, 18:23, 19:2, 19:6, 19:12,
19:16, 19:21, 20:4, 23:14,
23:21, 24:16, 27:9, 43:20,
76:4, 83:14, 83:20, 85:7, 89:3,
90:6, 93:1, 93:8, 99:17,
101:17, 102:2, 103:25, 109:3 .
Texarkana 2:33, 2:35 .
Texas 1:2, 1:12, 1:45, 2:15, 2:34,
2:41, 69:24 .
text 51:23, 51:24, 52:4, 52:11,
53:16 .
the'869 28:23 .
them--contents 101:18 .
theme 75:19 .
themes 75:17 .
themselves 30:25 .
theories 29:18 .
theory 32:2, 80:3, 80:4 .
they've 39:10, 42:10, 44:8,
44:10, 80:4, 80:11 .
thickness 47:7 .
think--and 36:22 .
third 54:9, 77:25, 80:7 .
Thomas 104:9 .
thorough 33:13 .
Thoroughness 99:1, 102:16 .
though 34:22, 54:14, 91:24 .
threat 19:9 .
three 4:19, 45:9, 46:8, 46:21,
47:1, 57:11, 58:14, 69:19,
73:7, 73:13, 86:21, 100:21,
101:10 .

Concordance

three-ring 10:12.
throughout 49:19, 108:11.
throwing 42:9, 44:1.
Thursday 9:15, 10:1, 10:4, 83:2,
 115:2, 115:14, 115:16.
Tidwell 2:32.
tie 21:8, 73:8, 80:14.
tied 74:25, 75:7, 80:12.
till 59:16.
timeline 50:19.
timely 16:23, 51:15.
timing 5:3.
Tingting 80:6.
to--are 24:17.
to--maybe 80:14.
Today 3:23, 83:13, 86:9, 101:9,
 101:21, 113:20, 116:6.
took 39:24, 45:4, 45:17, 48:3,
 48:23, 49:23, 49:24, 99:18.
top 45:8, 45:13, 46:2, 46:4,
 46:20, 46:24, 47:3, 47:7,
 49:21, 50:20, 51:21, 52:25,
 53:12, 57:4, 57:5.
total 77:6.
totality 19:20, 34:1, 110:11.
totals 78:12.
towards 21:1, 51:18.
training 108:20.
TRANSCRIPT 117:2, 117:4.
translation 77:16.
translators 13:12.
travel 12:5, 103:19.
tremendous 61:1.
trespassing 44:1.
Trial 4:16, 8:23, 10:11, 12:1,
 12:8, 12:9, 12:14, 14:10,
 16:11, 17:7, 29:25, 34:14,
 36:11, 38:20, 48:8, 53:8, 62:4,
 82:1, 101:21, 103:18, 114:7.
trials 4:23, 8:25.
tried 62:3.
trier 98:16, 110:17.
true 39:24, 42:17, 50:7, 64:1,
 69:13, 103:14.
truth 63:22.
trying 7:2, 11:7, 57:24, 66:23,
 80:8.
turn 17:7, 50:10, 78:20, 90:6.
turning 51:17.
twice 59:12.

TWO 2:4, 9:4, 17:14, 20:1, 20:13,
 21:3, 27:17, 28:4, 28:16,
 28:21, 40:20, 45:24, 49:14,
 50:21, 52:8, 57:18, 57:19,
 58:7, 58:15, 59:13, 78:15,
 79:17, 81:23, 84:5, 84:7, 84:9,
 84:11, 97:2, 99:16, 104:7.
TWS 62:6, 63:2, 64:11.
TX 2:35.
tying 61:10, 74:22.
TYLER 2:15.
type 40:8, 50:2, 78:17, 78:25,
 79:9, 90:9, 90:24, 103:8.
types 91:13.
typical 79:5.
typically 17:2, 62:11, 113:5.
 .
 .
< U > .
ultimate 101:3.
ultimately 35:19, 63:18, 105:21.
Ultralife 88:19.
unable 13:20, 13:24.
unambiguous 55:17, 55:18.
unavailable 9:4.
unaware 74:22.
unclear 60:19, 61:4, 82:8.
uncoated 93:18, 93:20, 95:13.
undercutting 29:18.
underline 53:15.
underlined 89:12.
underlying 67:4, 106:9.
understand 6:17, 10:15, 11:24,
 35:18, 36:14, 57:24, 60:4,
 61:15, 62:3, 72:21, 73:6, 85:1,
 88:8, 90:8, 90:18, 92:21,
 96:11, 97:17, 108:21, 111:19.
understanding 7:18, 9:21,
 27:15, 44:12, 106:12, 108:8,
 108:13, 108:15, 108:17.
Understood 7:14, 8:12, 65:5,
 85:21.
undertaking 96:24.
undue 61:1.
unduly 44:3, 110:8.
unequivocal 68:11, 68:14.
unexpectedly 9:3.
unintelligible 59:19.
unique 20:18, 22:14.
UNITED 1:1, 1:25, 62:6, 62:14,

64:11, 66:25, 67:4, 67:8,
 67:19, 74:16, 75:23, 76:8,
 76:12, 76:21, 78:1, 78:4,
 78:11, 78:19, 78:21, 79:2,
 80:12, 80:15, 117:7.
units 77:1, 77:7.
Unless 17:6, 37:19, 47:23, 65:1,
 81:1, 92:15.
unnamed 83:18.
unnecessary 71:12.
unpatentability 100:12.
unreasonable 31:9, 98:6, 100:4,
 100:23, 101:23.
unreasonableness 31:5.
unreliable 98:18.
unresolved 15:25.
until 16:24, 51:6, 59:20, 64:20,
 87:17, 96:12.
unusual 36:15.
up-to-date 12:6.
updated 107:2.
upheld 29:4.
upside 40:9.
USA 76:3.
users 76:23.
uses 28:15, 77:2, 77:5, 79:6.
using 42:5, 98:18.
USPTO 28:10.
 .
 .
< V > .
v. 55:16, 68:11, 69:20, 74:3.
valid 23:7, 29:17, 107:12,
 110:18, 110:19.
validity 37:12, 83:21, 101:1,
 113:19.
value 104:22.
variety 39:6.
various 49:6, 52:17, 98:21,
 107:9.
vast 107:8.
veil 74:7, 74:12.
verdict 9:2, 9:5.
version 28:12.
versus 3:3, 52:6, 68:8, 102:18.
video 114:11.
view 33:15, 37:22.
view--and 36:25.
views 43:25.
violate 7:9, 92:5.

Concordance

violates 93:9.
violation 8:11.
virtue 40:1.
voir 6:1, 6:6, 6:15, 7:19, 7:22, 8:14.
VOIT 2:3.
vs 1:9.
 .
 .
< W > .
waived 104:24.
waiver 50:12, 50:23, 50:25, 51:16, 89:18.
wall 94:10.
WANG 2:30, 4:3, 4:4, 45:1, 48:12, 48:16, 49:8, 49:15, 49:16, 55:22, 55:23, 56:17, 56:24, 58:3, 58:12, 58:23, 59:4, 59:11, 60:1.
wanted 5:1, 14:18, 15:13, 16:15, 27:1, 50:4.
wanting 23:3, 75:5.
wants 5:21, 14:19, 15:24, 51:24, 116:1.
war 63:4.
warranty 79:15, 80:23.
wars 63:6.
WASHINGTON 2:21.
Water 68:11.
Watson 55:16.
Wednesday 115:16.
week 4:16, 12:7, 112:19, 112:20, 114:6.
weight 81:5, 110:9.
welcome 17:16, 49:16.
weld 89:7, 89:8, 89:16, 89:23, 90:20, 90:21, 90:23, 91:13, 91:14, 91:22, 93:5, 94:1, 94:9, 94:12, 95:10, 95:11, 95:17, 96:2, 96:7, 96:25, 97:9, 97:10, 97:13.
welded 88:24, 89:14, 90:20, 91:12, 93:21, 95:15, 97:2, 97:8, 97:12.
welding 89:8, 89:16, 90:9, 90:10, 91:2, 91:3, 91:4, 93:6, 93:7, 96:3.
well-known 90:10.
well-reasoned 33:13, 35:24.
well-set 69:15.

Wes 3:10, 6:12, 17:10, 87:22.
WESLEY 2:11.
Whatever 5:7, 15:14, 16:6, 47:20, 55:25, 56:3, 56:5.
whereas 13:13, 32:12, 70:3.
wherein 93:17.
wherever 7:13.
whether--and 22:11.
whichever 88:10.
whom 71:1.
willful 18:19, 27:16, 30:19, 30:21, 30:22, 32:10, 32:16, 34:21, 36:13, 37:12, 38:21, 39:2, 41:16, 110:16.
willfully 19:19.
willfulness 32:14, 32:20, 33:18, 33:20, 34:2, 37:22, 41:25, 42:1, 42:3, 61:16, 98:5.
willing 13:19, 13:24, 109:6.
wireless 39:24.
withdraw 5:3, 5:6, 72:4, 83:4.
withdrawing 82:23, 87:25, 90:3.
withdrawn 18:4, 25:12, 33:6, 34:22, 60:4, 60:7, 65:12, 69:2, 72:7, 81:19, 82:1, 82:8, 82:21, 82:22, 86:12, 86:14, 86:15.
withdrew 26:8, 86:6, 89:25.
within 12:7, 105:6, 105:22.
Without 9:2, 23:19, 37:24, 42:6, 53:24, 54:4, 91:12, 113:13.
witness 11:5, 11:6, 12:15, 18:22, 61:5, 102:5, 103:21, 104:5, 109:25, 111:11, 111:12, 111:17.
witnesses 5:17, 11:9, 11:11, 12:1, 12:5, 12:22, 13:20, 13:24, 14:7, 21:8, 21:19, 25:2, 64:20, 101:16, 103:18, 114:10, 115:1.
WITTMAN 3:14, 26:21, 26:24, 28:3, 30:9, 30:20, 31:13, 31:19, 32:24, 36:18, 37:20, 38:2, 38:6, 49:17, 53:1, 53:12, 53:21, 55:8, 55:21, 88:12, 92:17, 92:18, 96:17, 96:18, 97:16, 97:19, 97:22.
Wittmann 2:10, 3:13.
word 43:1, 43:16, 56:1, 57:12, 115:21.
words 8:1, 34:12, 34:19, 39:14,

44:10, 52:19, 70:13, 77:1, 78:20, 79:8, 113:4.
work 13:20, 13:24, 14:1, 15:7, 15:14, 39:13, 39:14, 39:15, 40:18, 41:10, 105:15, 108:16.
workable 104:22.
workbench 40:25.
worked 15:10, 105:16.
working 12:4, 12:11, 76:6, 79:18.
works 32:14, 62:8.
world 79:7.
worldwide 62:13.
worth 102:20.
writing 26:11.
written 8:19, 11:13, 26:1, 27:11, 29:2, 30:9, 31:3, 31:4, 59:23, 60:18, 60:19, 88:9.
 .
 .
< X > .
Xiaoniao 80:6.
Xu 104:8.
 .
 .
< Y > .
yellow 50:22.
yesterday 68:5.
you-all 11:18.
 .
 .
< Z > .
zinc-air 81:23, 82:16, 82:17, 84:7, 84:13, 84:15.